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Gourley 3 p 12
Hamilton 251

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 124.

A. LAMONT CHUBB, PLAINTIFF IN ERROR,

vs.

CLARK W. UPTON, ASSIGNEE OF THE GREAT WESTERN INSURANCE COMPANY, A BANKRUPT.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

FILED SEPTEMBER 17, 1875.

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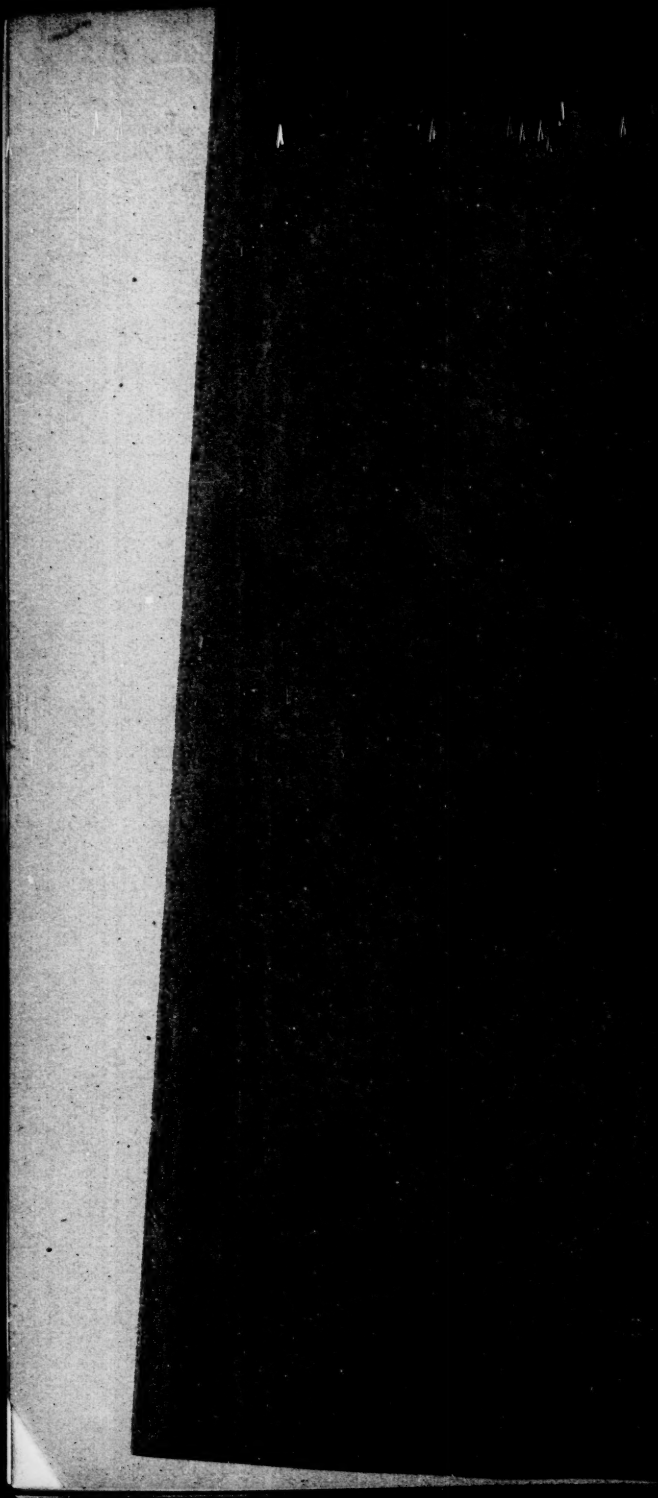

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INDEX.

	Original.	Print.
Return	1	1
Writ of error	2	1
Citation and service	4	1
Declaration	7	2
Defendant's plea	31	12
Jury	39	15
Verdict	39	15
Judgment	39	15
Bill of exceptions	40	15
Clerk's certificate	88	33

1 UNITED STATES OF AMERICA:

To the honorable judges of the Supreme Court of the United States of America:

Having examined the records and files in a cause lately pending in the circuit court of the United States for the sixth judicial circuit and western district of Michigan, wherein Clark W. Upton, assignee of the Great Western Insurance Company, was plaintiff, and A. Lamont Chubb defendant, I do find the following records and proceedings, to wit:

2 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Michigan, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Clark W. Upton, assignee of the Great Western Insurance Company, bankrupt, plaintiff, and A. Lamont Chubb, defendant, a manifest error hath happened, to the great damage of the said A. Lamont Chubb, defendant, as by his complaint appears:

3 We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the 28th day of January, in the year of our Lord one thousand eight hundred and seventy-five.

ISAAC H. PARRISH,
Clerk of the Circuit Court of the United States,
Western District of Michigan.

Allowed by

S. L. WITHEY,
U. S. Dist. Judge.

(Indorsed:) Clark W. Upton, assignee, &c., vs. A. Lamont Chubb. Writ of error. Filed Jan'y 28th, 1875. Isaac H. Parrish, clerk.

4 UNITED STATES OF AMERICA:

To Clark W. Upton, assignee of the Great Western Insurance Company, a bankrupt, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's

office of the circuit court of the United States for the western district of Michigan, wherein A. Lamont Chubb is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Solomon L. Withey, judge of the circuit court of the United States for the said district, this sixth day of February, A. D. 1875.

S. L. WITHEY,
District Judge of the United States for the Western District of Michigan, Presiding.

5 WESTERN DISTRICT OF MICHIGAN, *ss:*

On this tenth day of February, in the year of our Lord one thousand eight hundred and seventy-five, appeared John W. Champlin before me, the subscriber, Isaac H. Parrish, clerk of the circuit court of the United States for the western district of Michigan, and makes oath that he delivered a true copy of the within citation to Messrs. Hughes, O'Brien & Smiley, the attorneys of the within-named Clark W. Upton, assignee of the Great Western Insurance Company, the defendant in error within named, and at the same exhibited to them this original citation.

JOHN W. CHAMPLIN.

Subscribed and sworn to before me this 24th day of February, A. D. 1875.

ISAAC H. PARRISH, *Clerk.*

(Indorsed:) 429. C. court of U. S., western dis. of Mich. A. Lamont Chubb, pl'ff in error, ads. C. W. Upton, assignee, &c., def't in error. Proof of service of citation. Filed Feb. 24, 1875. Isaac H. Parrish, clerk.

6 . UNITED STATES OF AMERICA:

Circuit court of United States for sixth circuit and western district of Michigan.

CLARK W. UPTON, ASSIGNEE, &C.,
v.
A. LAMONT CHUBB.

Clerk of said court:

Please issue a writ of error to Supreme Court of United States in above-entitled cause, returnable 1st day of next term of Supreme Court, on behalf of Chubb.

Jan. 28th, 1875.

J. W. CHAMPLIN,
Att'y for Pl'ff in Error.

(Indorsed:) 429. U. S. circuit court, west. dist. Mich. Clark W. Upton, assignee, &c., vs. A. Lamont Chubb. Precipe for writ of error. Filed January 28, 1875. Isaac H. Parrish, clerk. J. W. Champlin, att'y for pl'ff.

7 UNITED STATES OF AMERICA:

The circuit court of the United States for the western district of Michigan, of the October term, A. D. 1875.

WESTERN DISTRICT OF MICHIGAN, *ss:*

Clark W. Upton, who is a citizen of the State of Illinois, and who is assignee of the Great Western Insurance Company, a corporation heretofore created and existing under and by virtue of the laws of the State of Illinois, and having its principal office in the city of Chicago and State of Illinois, and within the northern district of Illinois, which said corporation is also a citizen of the State of Illinois, and which said corporation has been heretofore, by the order and judgment of the district court of the United States for the northern district of Illinois, adjudged a bankrupt, in accordance with the provisions of an act of Congress of the United States entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867, and the amendments thereto, by Hughs, O'Brien and Smiley, his attorneys, complains of A. Lamont Chubb, defendant in this action, who is a citizen of the State of Michigan, upon a plea of trespass on the case
8 upon promises, filing this declaration as commencement of suit, acording to the rules and practice of this court.

For that whereas the said Great Western Insurance Company is a corporation created and existing under and in pursuance of an act of the legislature of the State of Illinois, entitled "An act to incorporate the Great Western Insurance Company of Chicago, Illinois," approved Febary 4th, A. D. 1857, for the purpose of insurance and taking of risks on all kinds of property, both marine and fire, and deriving profits from the said business of insurance to its stockholders, having a capital stock designated by the express terms of the said act of incorporation, and allowed as the sum of five hundred thousand dollars.

And whereas afterwards, to wit, on the 25th day of June, A. D. 1870, under and in pursuance of the provisions of the laws of the State of Illinois, the charter of the said company was by the stockholders and directors thereof amended so that its capital stock might be increased to five millions of dollars.

And whereas the capital stock of said company was divided into shares of one hundred dollars each, and the subscription and payment for which stock constituted its only fund and means of paying the losses said insurance company might meet in the prosecution of its business. And whereas five per cent. of the subscribed capital stock of said company was required to be paid as a company fund in cash, and the balance to be secured to be paid on demand, or otherwise, by approved judg-
9 ment-notes, hypothecated stock-mortgages on real estate in Cook County, in said State of Illinois, or other satisfactory security, and by its charter the said company was authorized and empowered to do any and all acts consistent with the constitution and laws of the said State of Illinois.

And for that whereas also, by the laws of the State of Illinois in such case made and provided, it was enacted and provided that the corporators and stockholders of any insurance company organized in the State of Illinois should severally be liable for all debts and responsibilities of such company to the amount of stock by him or them subscribed, until the whole amount of the capital stock of such company shall have been fully paid in and a certificate thereof recorded.

And whereas, also, the said defendant heretofore, to wit, on the 25th

day of November, A. D. 1870, at Grand Rapids, Mich., to wit, at Chicago, in the State of Illinois, subscribed for and took fifty shares of the capital stock of the said Great Western Insurance Company, and thereby became the owner and holder thereof, and then and there agreed and became bound and obligated thereby to pay the said Great Western Insurance Company twenty dollars per share, of one hundred dollars each, in installments, to wit, five per cent. on the receipt of a stock certificate, five per cent. in three months from the date thereof, five per cent. in six months from the date thereof, five per cent. in nine months from the date thereof, and the said defendant thereby became liable to pay the balance, to wit, eighty per cent., to wit, four thousand dollars, whenever lawfully called upon by said insurance company so to do.

10 And whereas, also, afterwards, to wit, on the 25th day of November, A. D. 1870, the said Great Western Insurance Company did, in accordance with the terms and conditions of the subscriptions aforesaid, make, execute, and deliver to the said defendant a certificate of fifty shares of its capital stock so subscribed for and agreed to be taken by said defendant as aforesaid, which said certificate was taken and accepted by the said defendant, whereby the said defendant became and was a stockholder in said company to the extent of, to wit, fifty shares of its capital stock, apportioned and set apart to and vested in him as aforesaid, whereby the said defendant became and ever since has continued to be a stockholder in said Great Western Insurance Company, exercising all the rights, powers, and privileges of a stockholder therein, by means whereof and by force of the statute in such case made and provided, the said defendant became liable to pay to said Great Western Insurance Company the sum of one hundred dollars upon each share of the capital stock of the said Great Western Insurance Company so taken, held, and owned by him as aforesaid.

And whereas afterwards, to wit, on the 3d day of January, A. D. 1870, to wit, at Chicago aforesaid, in consequence of great losses which said insurance company had prior to that time sustained by fire in the said city of Chicago and elsewhere, whereby its entire cash capital and assets were exhausted, by reason of its liability to its policy-holders, and to an amount greatly exceeding all its cash funds and means of

11 payment, and in an amount largely in excess of all sums that can be collected on its entire capital stock and assets, which said liabilities are still outstanding, due, and unpaid, and for the purpose of providing means of payment thereof the said Great Western Insurance Company, by a vote of its directors and stockholders duly convened for that purpose, to wit, on the day and year aforesaid, to wit, at Chicago, in the State of Illinois, duly assessed, called in, and ordered paid, to wit, twenty per cent. of the then remaining unpaid eighty per cent. on each share of stock, to wit, twenty dollars on each share thereof, so held by its stockholders on said unpaid capital stock, of which said stockholders then and there had notice that only a small amount, to wit, twenty per cent., had been paid on the stock subscribed for and held by the said defendant, as aforesaid, and which said sum so assessed, called in, and ordered paid is still due and owing from said defendant.

And whereas afterwards, in consequence of its losses so sustained as aforesaid, and the delinquencies of its stockholders in the payment of the calls so made upon them as aforesaid, the said Great Western Insurance Company became unable to meet its liabilities, and upon a petition filed in bankruptcy on the 17th day of January, 1872, by Richard M. Hooley against the said Great Western Insurance Company, the said insurance company was afterwards, to wit, on the 6th day of February,

A. D. 1872, adjudicated a bankrupt by the district court of the United States for the northern district of Illinois, in bankruptcy, in pur-
12 suance of the act of Congress of the United States in such case made and provided, as by the records thereof now remaining will fully and at large appear.

And whereas afterwards, to wit, on the 11th day of April, A. D. 1872, the said Clark W. Upton was duly appointed assignee in bankruptcy of the estate, effects, and property of the said Great Western Insurance Company, in conformity with law, and a deed of assignment of all the estate, effects, and property of the said Great Western Insurance Company, a bankrupt as aforesaid, was executed in due form of law under the hand and seal of Homer N. Hibbard, esq., register in bankruptcy for the first congressional district of the State of Illinois, and delivered to the said Clark W. Upton, so appointed assignee as aforesaid, thereby vesting in the said assignee the estate, property, rights, and effects of the said bankrupt.

And whereas, also, the said district court of the United States for the northern district of Illinois, sitting in bankruptcy in and for said district, on the application and petition of the said Clark W. Upton, assignee of the estate of said bankrupt as aforesaid, to wit, on the 5th day of July, A. D. 1872, made and entered of record in the said court a call upon the stockholders of the said bankrupt for the full payment of the entire unpaid capital stock of the said bankrupt severally held by them and each of them, and ordered the same paid, as hereinafter set forth; which said call and order of payment was of the following tenor and effect, to wit:

IN THE MATTER OF THE GREAT WESTERN Insurance Company, bankrupt, } In bankruptcy.

13 And now comes C. W. Upton, assignee of the estate of said bankrupt, and makes application to this court, showing that a large amount of the capital stock of the said bankrupt remains unpaid in part; that the whole amount of such capital stock will be required to be paid in order to meet the demands now due from and proven against the estate of said bankrupt, and upon investigation of the facts in the matter, and the court being fully advised in the premises, it is ordered that the entire amount unpaid on the capital stock of said bankrupt be paid to said assignee on or before the 15th day of August, A. D. 1872, at his office in Chicago, Illinois, and in default thereof that said assignee proceed to collect the same. It is further ordered that notice of this call be given to the stockholders of said bankrupt, so far as known, without unreasonable delay, by publication or otherwise.

And the plaintiff, assignee as aforesaid, avers that notice in accordance with the terms and conditions of said order of the said court was duly given to the stockholders of said bankrupt as therein and thereby required. That a small amount, to wit, twenty per cent. only, has been paid upon each of the said shares of stock in the said bankrupt company which are now held and owned by the said defendant. And whereas the said company did publish and advertise the entire amount unpaid upon its capital stock issued, including the amount paid upon the stock by the defendant held as aforesaid, as a part of its resources wherewith to pay losses and protect its creditors, and did procure
14 the insurance, the losses upon which are now due and unpaid, and for the indebtedness upon which losses render it now insolvent, upon such publication and advertisement and by reason of the facts

day of November, A. D. 1870, at Grand Rapids, Mich., to wit, at Chicago, in the State of Illinois, subscribed for and took fifty shares of the capital stock of the said Great Western Insurance Company, and thereby became the owner and holder thereof, and then and there agreed and became bound and obligated thereby to pay the said Great Western Insurance Company twenty dollars per share, of one hundred dollars each, in installments, to wit, five per cent. on the receipt of a stock certificate, five per cent. in three months from the date thereof, five per cent. in six months from the date thereof, five per cent. in nine months from the date thereof, and the said defendant thereby became liable to pay the balance, to wit, eighty per cent., to wit, four thousand dollars, whenever lawfully called upon by said insurance company so to do.

10 And whereas, also, afterwards, to wit, on the 25th day of November, A. D. 1870, the said Great Western Insurance Company did, in accordance with the terms and conditions of the subscriptions aforesaid, make, execute, and deliver to the said defendant a certificate of fifty shares of its capital stock so subscribed for and agreed to be taken by said defendant as aforesaid, which said certificate was taken and accepted by the said defendant, whereby the said defendant became and was a stockholder in said company to the extent of, to wit, fifty shares of its capital stock, apportioned and set apart to and vested in him as aforesaid, whereby the said defendant became and ever since has continued to be a stockholder in said Great Western Insurance Company, exercising all the rights, powers, and privileges of a stockholder therein, by means whereof and by force of the statute in such case made and provided, the said defendant became liable to pay to said Great Western Insurance Company the sum of one hundred dollars upon each share of the capital stock of the said Great Western Insurance Company so taken, held, and owned by him as aforesaid.

And whereas afterwards, to wit, on the 3d day of January, A. D. 1870, to wit, at Chicago aforesaid, in consequence of great losses which said insurance company had prior to that time sustained by fire in the said city of Chicago and elsewhere, whereby its entire cash capital and assets were exhausted, by reason of its liability to its policy-holders, and to an amount greatly exceeding all its cash funds and means of

11 payment, and in an amount largely in excess of all sums that can be collected on its entire capital stock and assets, which said liabilities are still outstanding, due, and unpaid, and for the purpose of providing means of payment thereof the said Great Western Insurance Company, by a vote of its directors and stockholders duly convened for that purpose, to wit, on the day and year aforesaid, to wit, at Chicago, in the State of Illinois, duly assessed, called in, and ordered paid, to wit, twenty per cent. of the then remaining unpaid eighty per cent. on each share of stock, to wit, twenty dollars on each share thereof, so held by its stockholders on said unpaid capital stock, of which said stockholders then and there had notice that only a small amount, to wit, twenty per cent., had been paid on the stock subscribed for and held by the said defendant, as aforesaid, and which said sum so assessed, called in, and ordered paid is still due and owing from said defendant.

And whereas afterwards, in consequence of its losses so sustained as aforesaid, and the delinquencies of its stockholders in the payment of the calls so made upon them as aforesaid, the said Great Western Insurance Company became unable to meet its liabilities, and upon a petition filed in bankruptcy on the 17th day of January, 1872, by Richard M. Hooley against the said Great Western Insurance Company, the said insurance company was afterwards, to wit, on the 6th day of February,

A. D. 1872, adjudicated a bankrupt by the district court of the United States for the northern district of Illinois, in bankruptcy, in pur-
12 suance of the act of Congress of the United States in such case made and provided, as by the records thereof now remaining will fully and at large appear.

And whereas afterwards, to wit, on the 11th day of April, A. D. 1872, the said Clark W. Upton was duly appointed assignee in bankruptcy of the estate, effects, and property of the said Great Western Insurance Company, in conformity with law, and a deed of assignment of all the estate, effects, and property of the said Great Western Insurance Company, a bankrupt as aforesaid, was executed in due form of law under the hand and seal of Homer N. Hibbard, esq., register in bankruptcy for the first congressional district of the State of Illinois, and delivered to the said Clark W. Upton, so appointed assignee as aforesaid, thereby vesting in the said assignee the estate, property, rights, and effects of the said bankrupt.

And whereas, also, the said district court of the United States for the northern district of Illinois, sitting in bankruptcy in and for said district, on the application and petition of the said Clark W. Upton, assignee of the estate of said bankrupt as aforesaid, to wit, on the 5th day of July, A. D. 1872, made and entered of record in the said court a call upon the stockholders of the said bankrupt for the full payment of the entire unpaid capital stock of the said bankrupt severally held by them and each of them, and ordered the same paid, as hereinafter set forth; which said call and order of payment was of the following tenor and effect, to wit:

IN THE MATTER OF THE GREAT WESTERN Insurance Company, bankrupt, } In bankruptcy.

13 And now comes C. W. Upton, assignee of the estate of said bankrupt, and makes application to this court, showing that a large amount of the capital stock of the said bankrupt remains unpaid in part; that the whole amount of such capital stock will be required to be paid in order to meet the demands now due from and proven against the estate of said bankrupt, and upon investigation of the facts in the matter, and the court being fully advised in the premises, it is ordered that the entire amount unpaid on the capital stock of said bankrupt be paid to said assignee on or before the 15th day of August, A. D. 1872, at his office in Chicago, Illinois, and in default thereof that said assignee proceed to collect the same. It is further ordered that notice of this call be given to the stockholders of said bankrupt, so far as known, without unreasonable delay, by publication or otherwise.

And the plaintiff, assignee as aforesaid, avers that notice in accordance with the terms and conditions of said order of the said court was duly given to the stockholders of said bankrupt as therein and thereby required. That a small amount, to wit, twenty per cent. only, has been paid upon each of the said shares of stock in the said bankrupt company which are now held and owned by the said defendant. And whereas the said company did publish and advertise the entire amount unpaid upon its capital stock issued, including the amount paid upon the stock by the defendant held as aforesaid, as a part of its resources wherewith to pay losses and protect its creditors, and did procure
14 the insurance, the losses upon which are now due and unpaid, and for the indebtedness upon which losses render it now insolvent, upon such publication and advertisement and by reason of the facts

aforesaid, the said defendant is now indebted thereon to the pl'intiff' as assignee as aforesaid, for the remaining unpaid portion, to wit, eighty per cent. thereof, to wit, for the sum of four thousand dollars, and being so indebted, the said defendant, in consideration of the premises. afterwards, to wit, on the 15th day of August, A. D. 1872, to wit, at Chicago aforesaid, to wit, in said district of Michigan, undertook and promised the said plaintiff, as assignee as aforesaid, to pay him said last-named sum of money when he should thereunto afterwards be requested.

Yet the said defendant, although often requested so to do, has not paid the said several sums of money, or either of them, or any part thereof, but so to do has wholly neglected and refused, and still neglects and refuses so to do.

For that whereas the Great Western Insurance Company was and is a corporation chartered, organized, and existing under and by virtue of the laws of the State of Illinois, for the purpose of doing an insurance business, issuing policies for premiums, and taking risks upon property for losses by fire, and the payment of losses to its policy-holders in cases where said losses occur, having its principal office at Chicago, in the northern district of Illinois. And the said defendant heretofore, to wit,

15 on the 25th day of November, A. D. 1870, at his special instance and request, became and was and now is a stockholder in said insurance company, and at the time aforesaid subscribed for and took fifty shares, of one hundred dollars each, of the capital stock of said corporation, which said shares were then and there set apart to the said defendant by the said insurance company, and were then and there taken and accepted by the said defendant, and the said defendant afterwards, to wit, Nov. 25, '70, paid twenty per cent. of said subscription, and then and there became liable to pay, and promised to pay, to said insurance company the remaining eighty per cent. of said subscription when he should be thereunto afterwards lawfully requested.

And the said plaintiff avers that the subscriptions to the capital stock of said insurance company constituted the greater portion of the assets of said insurance company, and the chief security of its policy-holders in case of loss; that the said defendant was and is one of a large number of subscribers to said capital stock and stockholders of said corporation, and that the said capital stock is of a large amount, to wit, one million dollars and upwards.

And the said plaintiff avers that heretofore, to wit, on and prior to October 9th, A. D. 1871, the said Great Western Insurance Company met with great losses, to wit, nine hundred thousand dollars, by fire, to the policy-holders insured by said company, and to an amount larger than all said company's collected assets, and more than all the collectable assets of said company, including the said subscriptions of said stockholders so remaining uncollected and not paid in as aforesaid.

16 That thereupon, afterwards, to wit, on the 6th day of February, A. D. 1872, the said Great Western Insurance Company was unable to meet its said losses and liabilities, and became bankrupt, and was on the day and year last aforesaid, upon the petition of Richard M. Hooley, duly adjudged a bankrupt under the laws of the United States, by the district court of the United States for the northern district of Illinois, sitting in bankruptcy.

That afterwards, to wit, on the 7th day of April, A. D. 1872, the said plaintiff was duly appointed assignee in bankruptcy of the said Great Western Insurance Company, bankrupt, as aforesaid, and a deed of assignment of all the estate, effects, and property of said Great Western Insurance Company was executed and delivered, in conformity with law,

to the said plaintiff, thereby vesting in said plaintiff the estate, property, and effects of the said bankrupt.

And the said plaintiff avers that heretofore, to wit, on the 5th day of July, A. D. 1872, the said district court, sitting in bankruptcy, upon the application and petition of said assignee, entered and made an order and call upon the said stockholders of the said bankrupt for the full payment of the entire unpaid capital stock of the said bankrupt severally held by them and each of them, and ordered the same paid to the said assignee on or before August 15th, A. D. 1872, and in default thereof that said assignee proceed to collect the same; all of which the said defendant had notice, to wit, on the day and year last aforesaid.

17 And the said plaintiff avers that only a small portion of the said subscription of the said defendant, to wit, twenty per cent. thereof, has been paid, and that the balance thereof, to wit, eighty per cent. thereof, still remains unpaid and due from the said defendant.

And the said plaintiff avers that the said insurance company, at and before issuing its said policies, did publish, advertise, and hold out to the public and to said policy-holders that the large amount subscribed of its capital stock, to wit, upwards of one million dollars as aforesaid, including the amount subscribed by said defendant, was a part of its assets and resources wherewith to pay losses, meet its liabilities, and protect its creditors, and did procure its risks, the losses upon which are now due and unpaid, which losses now render said company insolvent, upon such advertisement and representations.

And by reason of the facts aforesaid, the said defendant became and was and now is indebted to the plaintiff, as assignee as aforesaid, for the remaining unpaid portion of said subscription, to wit, eighty per cent. thereof, to wit, the sum of four thousand dollars, and being so indebted and liable to pay the same, the said defendant, in consideration of the premises, afterwards, to wit, on the 15th day of August, A. D. 1872, to wit, at Chicago aforesaid, to wit, at Grand Rapids, in said district of Michigan, undertook and faithfully promised to pay the said plaintiff, assignee as aforesaid, the said last-named sum of money when he should be thereunto requested.

18 Yet the said defendant, although often requested so to do, has not paid the said sum of money, or any part thereof, but has wholly neglected and refused, and still neglects and refuses so to do.

Yet the said defendant, although often requested, has not paid the said several sums of money, or either or any part thereof, but has wholly neglected and refused so to do.

And whereas, also, the said defendant, heretofore, to wit, on the 25th day of November, A. D. 1870, to wit, at Chicago, in the northern district of Illinois, being the holder and owner of fifty other shares of one hundred dollars each of the capital stock of the Great Western Insurance Company aforesaid, upon which had been paid a small sum, to wit, twenty per cent. thereof, or twenty dollars on each share thereof, the residue and balance due thereon, to wit, being eighty per cent. thereof, to wit, eighty dollars on each share thereof, being subject to assessment on call of said company, its board of directors, agents, or creditors, whenever thereafterwards the same should be required to pay the debts or liabilities of the said Great Western Insurance Company in the due course of its business as an insurer against fire or marine losses, or both.

And whereas the said Great Western Insurance Company, in consequence of losses sustained by its policy-holders, for which it became and

was liable to pay and indemnify against to an amount greatly exceeding all its assets, and more than can be collected upon all of its
19 said assets and unpaid capital stock, and which said liabilities are now subsisting and wholly unpaid, all of which the defendant had notice, and in consequence of the non-payment thereof the said Great Western Insurance Company has been, by the judgment and order of the district court of the United States for the northern district of Illinois, sitting in bankruptcy, on petition duly filed in said court for that purpose by its creditors, duly adjudged a bankrupt, in pursuance of the laws of the United States in that behalf enacted and provided, of which defendant had notice. And whereas, upon such adjudication, the said Clark W. Upton was appointed the assignee of the estate of the said bankrupt, under and in pursuance of the bankrupt-laws of the United States in that behalf enacted, and as such assignee now holds the estate of said bankrupt, in pursuance of said bankrupt-law as aforesaid.

And whereas the said United States district court, sitting in bankruptcy, on petition duly filed for that purpose, did order and adjudge, among other things, that the whole amount of the unpaid capital stock of said insurance company, bankrupt, will be required to be paid in order to meet its liabilities and demands proven in bankruptcy against said bankrupt, and did further order that the entire amount unpaid on the capital stock of the said bankrupt insurance company be paid by its stockholders to the said plaintiff, as assignee as aforesaid, on or before the 15th day of August, A. D. 1872, at his office in Chicago, Illinois, of which said defendant then and there had notice, as by the records
20 and proceedings of the said court will more fully and at large appear, which said time has long since elapsed.

By means whereof, and by force of the statutes in such case made and provided, the said defendant became and is liable to pay to said plaintiff a large sum of money, to wit, eighty per cent., or eighty dollars on each share of stock so held and owned by him as aforesaid, to wit, four thousand dollars, and being so liable, the said defendant, in consideration thereof, afterwards, to wit, on the 15th day of August, A. D. 1872, at Chicago aforesaid, undertook and promised the said plaintiff as assignee as aforesaid, to pay him said last-mentioned sum of money on request, and which, though often requested, said defendant wholly neglects and refuses to pay, or any part thereof.

And whereas, also, the said defendant, heretofore, to wit, on the 15th day of August, A. D. 1872, at Chicago, in the northern district of Illinois, aforesaid, to wit, at Grand Rapids, in said western district of Michigan, became and was indebted to the Great Western Insurance Company, which said insurance company has been duly adjudged a bankrupt in pursuance of law, for fifty shares of the capital stock of said company, of one hundred dollars each, before that time bargained, sold, set apart, and transferred to him, said defendant, by the said insurance company, on the books of said company, at his, said defendant's, special instance and request, the certificates whereof were delivered to said defendant, and being so indebted to the said defendant in consideration
21 thereof, afterwards, to wit, on the day and year last aforesaid, to wit, at Chicago aforesaid, undertook, and then and there faithfully promised the said plaintiff, as the assignee in bankruptcy of the estate of the said Great Western Insurance Company, bankrupt as aforesaid, duly appointed according to law, to pay him therefor when he, the said defendant, should be thereunto afterwards requested.

And also for that whereas, heretofore, to wit, at Grand Rapids, Mich., on, to wit, the 25th day of November, A. D. 1870, the said defendant, at

his special instance and request, became and was the legal owner of certain, to wit, fifty other shares of the stock of the said Great Western Insurance Company, of the par value of one hundred dollars each, upon which said stock there was unpaid and uncalled for at the said time, when the said defendant became the said legal owner thereof, to wit, the sum of eighty dollars per share, the payment of which said sum of eighty dollars per share always theretofore had been, and at the time the said defendant became the legal owner thereof as aforesaid was, unsecured to said company save by the obligation of whoever might be the legal owner thereof to pay the same, and which said sum of eighty dollars per share he, the said defendant, upon becoming the legal owner of said stock, in consideration of the rights and privileges thereby by him, said defendant, acquired, promised and agreed to and with said company that he, the said defendant, would pay to said company upon each and every of said shares so by him owned, as aforesaid, whenever he, the said defendant, should be legally and properly called upon so to do.

22 And the plaintiff saith that said defendant hath often been legally and properly called upon to pay the said sum of eighty dollars per share upon each of said fifty shares so by him owned, as aforesaid, to wit, the sum of four thousand dollars, and that he, said defendant, was, at the time of so being called upon to pay said sum, the legal owner of, to wit, said fifty shares of said stock. Nevertheless he, the said defendant, hath not paid the same, or any part thereof, to said company or to this plaintiff, whereby an action hath accrued to this plaintiff as assignee in bankruptcy, to have and demand of the said defendant the said sum of 4,000 dollars.

And whereas, also, the said defendant, afterwards, to wit, on the day and year last aforesaid, at Chicago, in the northern district of Illinois aforesaid, to wit, at Grand Rapids, in said western district of Michigan, was indebted to the said plaintiff, assignee as aforesaid, in the further sum of four thousand dollars, like lawful money, for fifty shares of the capital stock of the Great Western Insurance Company, theretofore issued and delivered to him, the said defendant, of the par value of one hundred dollars per share, by the Great Western Insurance Company, at his, the said defendant's, special instance and request, and which said shares of said capital stock were severally at the commencement of this suit owned and held by him, the said defendant, and being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at Chicago aforesaid, undertook and then and there faithfully promised to pay said last-mentioned sum

23 of money when he, the said defendant, should be thereunto afterwards requested; yet though often requested, said defendant wholly neglects and refuses to pay therefor, or for any part thereof.

And whereas, also, afterwards, to wit, on the day and year last aforesaid, to wit, at Chicago aforesaid, in consideration that the Great Western Insurance Company, a corporation theretofore created and existing under and in pursuance of the laws of the State of Illinois, at the like special instance and request of the said defendant, had before that time issued in due form of law, and delivered to him, the said defendant, shares of its capital stock, of the par value of one hundred dollars for each and every share so issued and delivered to said defendant, he, the said defendant, undertook, and then and there faithfully promised the said Great Western Insurance Company, and the said plaintiff, as its assignee legally appointed, to pay for the said share so issued to and held by him, the said defendant as aforesaid, the sum of one hun-

dred dollars for each and every share of the said capital stock so issued and delivered to him, the said defendant as aforesaid, when he should be thereunto afterwards requested; yet, though often requested, said defendant has not paid the said sum of money, or any part thereof, to the said Great Western Insurance Company, or to the plaintiff, its assignee as afo*a*esaid, but wholly neglects and refuses so to do.

And whereas, also, the said defendant, heretofore, to wit, on the 25th day of November, A. D. 1870, at Chicago, in the northern dis-
24 trict of Illinois, to wit, at Grand Rapids, in said western district of Michigan, was indebted to the Great Western Insurance Company, a corporation heretofore created and existing under and in pursuance of the laws of the State of Illinois, and to the plaintiff at the commencement of this suit as assignee thereof for that purpose duly appointed, for divers stocks, goods, and chattles, to wit, fifty shares of the capital stock of the Great Western Insurance Company, of the par value of one hundred dollars for each and every share before that time subscribed for, issued to, and held by the said defendant, at his special instance and request, whereby the said defendant became and was a stockholder in the said Great Western Insurance Company, the rights and privil*i*ges whereof the said defendant used and enjoyed, with the gains and profits thereunto pertaining, and, being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at the said city of Chicago aforesaid, undertook, and then and there faithfully promised the said plaintiff's assignee as aforesaid, to pay him for the said goods, chattels, and stock at the rate of one hundred dollars per share thereof, when he, the said defendant, should be thereunto afterwards requested.

And whereas, also, the said defendant, to wit, on the 15th day of August, A. D. 1871, to wit, at Grand Rapids, in said western district of Michigan, was indebted to the Great Western Insurance Company, of Chicago, Illinois, in the sum of ten thousand dollars for the price and value of fifty shares of the capital stock of said Insurance Com-
25 pany, delivered to said defendant by said insurance company, at said defendant's request;

And in a like sum for money then paid by said insurance company for the defendant at his request;

And in a like sum for money then lent by said insurance company to said defendant at his request;

And in a like sum for money then received by the defendant for the use of said insurance company;

And in a like sum for money found to be due from the defendant to the said insurance company on account stated between them.

And the said plaintiff avers that he has been appointed assignee of said insurance company, in bankruptcy, and that thereby an action hath accrued to him, as such assignee, to demand and have of and from said defendant the said several sums of money so as aforesaid due and owing to the said insurance company, bankrupt as aforesaid.

And whereas, also, the defendant, on the 15th day of August, A. D. 1871, to wit, at Grand Rapids, in said western district of Michigan, was indebted to the plaintiff in the sum of ten thousand dollars, for the price and value of goods then sold and delivered by the plaintiff to the defendant, at his request;

And in a like sum for the price and value of work then done, and materials for the same, provided by the plaintiff for the defendant at his request;

And in a like sum for money then lent by the plaintiff to the defendant at his request;

And in a like sum for money then paid by the plaintiff for the defendant, at his request;

26 And in a like sum for money then received by the defendant for the use of the plaintiff;

And in a like sum for money found to be due from the defendant to the plaintiff on an account stated between them.

And whereas the defendant, afterwards, and on the day and year aforesaid, in consideration of the premises respectively, then promised the plaintiff to pay him the said several mentioned moneys, respectively, on request; yet he has disregarded his said promises, and has not paid any of the said moneys, or any part thereof, to the plaintiff's damage of twenty thousand dollars; and yet, though often requested, the said defendant wholly neglects and refuses to pay either of the sums of money in the several counts of this declaration mentioned, or any part thereof, to the said plaintiff, assignee as aforesaid, to the plaintiff's damage, as assignee as aforesaid, as he says, in the sum of ten thousand dollars; and therefor he brings suit.

HUGHES, O'BRIEN AND SMILEY,
Pl'ff's Att'ys.

27 (Indorsed:) The circuit court of the United States for the western district of Michigan. Clark W. Upton, assignee Great Western Insurance Company, vs. A. Lamont Chubb.

To the within-named defendant:

Take notice that, on filing a declaration in this cause (of which the within is a true copy) as commencement of this suit, a rule was entered in the book of common rules, kept by the clerk of said court, in his office, in the city of Grand Rapids, requiring you to plead to such declaration within twenty days after the service of a copy thereof, and notice of said rule or judgment, etc.

Yours, etc.,

HUGHES, O'BRIEN & SMILEY,
Attorneys for Pl't'ff.

Dated March 19th, 1873.

HUGHES, O'BRIEN & SMILEY,
Plaintiff's Attorneys.

28 MARCH 19, '73.

CLARK W. UPTON, ASSIGNEE, &C.,
vs.
A. LAMONT CHUBB.

On reading & filing the declaration of suit in this cause, & on motion of Hughes, O'Brien & Smiley, att'ys for pl'ff—

Ordered, That the defendants appear & plead to said declaration within twenty days after personal service thereof, together with notice of this rule, or judgment.

HUGHES, O'BRIEN & SMILEY,
Pl'ff's Att'ys.

(Indorsed:) U. S. circuit court, west. dist. Mich. Clark W. Upton, assignee, &c., vs. A. Lamont Chubb.

29 UNITED STATES OF AMERICA:

The circuit court of the United States for the sixth circuit and western district of Michigan.

A. LAMONT CHUBB
ads.
CLARK W. UPTON, ASSIGNEE OF THE GREAT Western Insurance Company.

SIR: Please enter the appearance of the above-named defendants in this cause.

Dated April 8th, 1873.

Yours, &c.,

CHAMPLIN & BUTTERFIELD,
Att'ys for Def't.
NORRIS & BLAIR, *Of Counsel.*

To ISAAC H. PARRISH,
Clerk of said Court.

30 UNITED STATES OF AMERICA:

The circuit court of the United States for the western district of Michigan.

A. LAMONT CHUBB
ads.
CLARK W. UPTON, ASSIGNEE OF THE GREAT Western Insurance Company.

It is hereby stipulated, on the part of Champlin and Butterfield, attorneys for the above-named defendant, that Champlin, Butterfield and Fritz Gerald be substituted, in place of Champlin and Butterfield, as attorneys for said defendant, and also that an order to that effect be entered in the usual form in the common-rule book.

Dated Sept. 25th, A. D. 1873.

CHAMPLIN AND BUTTERFIELD,
Atty's for Def't.

31 UNITED STATES OF AMERICA:

In the circuit court of the United States for the sixth circuit and western district of Michigan.

A. LAMONT CHUBB
ads.
CLARK W. UPTON, ASSIGNEE OF THE GREAT Western Insurance Company.

Now comes the said defendant, by Champlin, Butterfield and Fitz Gerald, his attorneys, and demands trial of the matters set forth in said plaintiff's declaration.

CHAMPLIN, BUTTERFIELD AND FITZ GERALD,
Def't's Att'ys.

32 The circuit court of the United States for the sixth circuit and western district of Michigan.

CLARK W. UPTON, ASSIGNEE OF THE GREAT Western Insurance Company,
vs.
A. LAMONT CHUBB.

And now, on this 18th day of December, A. D. 1874, upon the trial of this cause, under leave of the court first had and obtained, comes the defendant herein, by Champlin and Butterfield, his attorneys, and adds to this plea of the general issue herein the following notice:

Take notice that on the trial of this cause the defendant will give in evidence and insist in bar of the plaintiff's action—

1st. That the defendant was induced to purchase the stock, an assessment upon which is sued for in this cause, solely by and through the following representations of the Great Western Insurance Company:

(*a*) That by a resolution of the board of directors of said company, before that duly passed, the said company authorized its agents
33 to sell stock upon express condition that the buyer should pay but twenty per cent. of the face value of the stock bought, and that the remaining eighty per cent. should never be paid except by the profits of the business; that by virtue of its special charter and the amendment thereto, said company had power and authority to make such contract, and that by such special charter and amendment such contract was legal, valid, and obligatory, and that because of such charter and amendment no more than twenty per cent. could in any event be collected by said company, or any of its legal representatives; which representation was false in this, to wit: No such authority was conferred by the charter and its amendment, and so such consequences did follow the making of such purchase.

(*b*) That the company had power and authority by virtue of its charter and amendment to issue valid and valuable stock; which was false, and they had no such power.

(*c*) That the company had five million dollars of authorized stock; which was false.

(*d*) That the company had a subscribed capital of one million
34 dollars, and that James H. Rees, J. M. W. Jones, Fernando Jones, J. Seely Wallace, and Philip Wadsworth, individuals known to this defendant, some personally and all by reputation, were stockholders in said company; that the management was in the hands of the best men in Chicago, such as J. McK. Sawyer, Philip Wadsworth, J. Seeley Wallace, J. M. W. Jones, individuals known to this defendant, some personally and some by reputation, and relying upon the truth of these statements defendant purchased the stock the assessment upon which is in suit; all which representatives were false; none of the parties named were either stockholders or directors.

(*e*) That by the charter and amendment, and the law of the State of Illinois, the company were authorized to and would leave all the money paid for stock in the city of Grand Rapids, to be loaned out to the stockholders (of which number was this defendant) at low rates of interest, until needed by the company; whereas, in truth and fact, the law was otherwise, and required all investments and securities to be returned to and kept at Chicago or elsewhere in Illinois.

35 (*f*) Defendant further gives notice and avers that he never received any dividend from said stock, nor any benefit or advantage whatever therefrom; that he never took part in any of the pro-

ceedings of said company, in any way, after notice of the facts and the falsity thereof herein stated; that he never, to his knowledge or with his consent, was published or held out to the creditors of this company, or to any other, as a stockholder in said company.

(*g*) Defendant further gives notice and avers that he had no notice or information, or any facts to put him upon inquiry touching the truth or falsity of the representations aforesaid until after the bankruptcy of said company and until after the commencement of this suit; and that all the diligence he could have exercised in that regard as a business man, without the assistance of counsel learned in the law, would not have informed him of the facts he has hereinbefore given notice of and as he avers to be, which knowledge he acquired in the month of November last, and since the commencement of this suit.

(*h*) Defendant now, as he has personally done on the trial of
36 this cause, offers to surrender his certificate of stock to the company or its assignee, the plaintiff herein, to be cancelled.

(*i*) That the Great Western Insurance Company during its solvency published and held out to the public, and it was a public, well-known, and recognized fact, well known to all its insured creditors, that but 20 % of all its subscribed capital was available to them in payment of losses, if any there should be. That such fact was made public and was well known to all the creditors or insured prior to their becoming insured in such company, and was spread upon the records of such corporation in the words following, to wit:

"*Minutes of executive committee.*

"A communication was received from the president and secretary of the company, stating that the agents of the company appointed to make sale of the stock of the company had reported to them that they were unable to sell the stock, as the certificates were then being issued, with twenty cents paid, for the reason that those contemplating the purchase of the stock were afraid of being made liable for eighty cents
37 more, notwithstanding the assurance of our agents that the twenty cents paid was all they would ever have to pay.

"D'r Sherman, one of the stock-agents of the company being present, stated to the executive committee that, from this experience in endeavoring to sell the stock of the company, he was satisfied in his own mind that it could not be placed while the question of liability was left, as it seemed to many people, indefinite; notwithstanding the assurances that twenty cents would be all they would ever have to pay.

"After further consultation, the following resolution was offered and adopted, to wit:

"Resolved, That the twenty cents paid and endorsed on the certificate of stock of the Great Western Insurance Company shall be in full payment of the stock so issued, and that the words 'non-assessable shall be printed across the face of every certificate of stock;

"Also be it further resolved, That all persons having heretofore
38 subscribed to the capital stock of the company shall be authorized to exchange the existing issue of stock now in their possession for the new form of certificates in accordance with the spirit of the foregoing resolution, and to immediately send copies of the above resolution to all stock-agents of the company now in the field."

CHAMPLIN, BUTTERFIELD AND FITZ GERALD,
Def't's Att'y.

39 CLARK W. UPTON, ASSIGNEE OF THE Great Western Insurance Company, *vs.* A. LAMONT CHUBB. } October term, A. D. 1874. Friday, Dec. 18th.

In this cause, the parties being in court and ready for trial, the following jury was called and sworn, to wit: J. A. Tillson, Asa Spencer, John N. Nevins, Isaac N. Keeler, Samuel Howland, Joseph Musgrave, Allen C. Adsit, Horatio Hall, Arthur C. Prince, Fitz L. Reed, James H. Tibbitts, Zechariah Fletcher, who, having heard the proofs and allegations of the parties, the arguments of counsel, and the charge of the court, say, upon their oaths, that the said defendant did undertake and promise in manner and form as the plaintiff hath alleged in his declaration, and they assess the plaintiff's damages at the sum of three thousand nine hundred and ninety-one dollars and seventy-five cents, (3,991.75.)

It is thereupon considered by the court that the said plaintiff do recover against the said defendant the said sum so assessed by the jury as aforesaid, together with his costs and charges, to be taxed, and that they have execution thereof.

It is ordered that the defendant have thirty days from this date in which to move for a new trial, and that in the mean time all proceedings be staid.

(Indorsed:) U. S. circuit court, west. dist. Mich. Clark W. Upton, assignee, &c., vs. A. Lamont Chubb. Copy of judgment. Hughes, O'Brien & Smiley, att's for pl'ff.

40 UNITED STATES OF AMERICA:

The circuit court of the United States for the sixth circuit and western district of Michigan.

CLARK W. UPTON, ASSIGNEE OF THE GREAT Western Insurance Company, bankrupts, *v.* A. LAMONT CHUBB.

Afterwards, to wit, at the day and place within contained, before the Hon. Solomon S. Withey, district judge of the western district of Michigan, presiding, comes as well the said Clark W. Upton, assignee of the Great Western Insurance Company, bankrupts, by Messrs. Hughs, O'Brien and Smiley, his attorneys and counsil, as the said A. Lamont Chubb, by Messrs. Champlin & Butterfield, his attorneys and counsil, and the jurors of the jury whereof mention is within made, being called, likewise come, and after being elected, tried, and sworn to try the several issues within joined, the counsil for the said plaintiff, to maintain the said issues on his part, introduced and read in evidence the charter of the Great Western Insurance Company, as follows:

"An act to incorporate the Great Western Insurance Company of Chicago, Illinois.

41 "SECTION 1. Be it enacted by the people of the State of Illinois, represented in the general assembly, That William W. Danenhower, Jacob Russell, Thomas Hale, George Ely, Robert H. Foss, and their successors and associates, be, and are hereby, created a body cor-

porate and politic, under the name and style of the Great Western Insurance Company, situated at Chicago, and by that name shall have and enjoy all the rights privileges and immunities that other like corporations have, and be recognized in all courts of justice and equity in this State.

"SEC. 2. When the said party and their associates shall have subscribed one hundred thousand dollars, paying in as a company-fund five per cent. on the amount subscribed and securing the balance to be paid on demand or otherwise, by improved judgement-notes, by hypothecated stock, mortgages on real estate in Cook County, or other satisfactory security, and shall have chosen nine directors, and those directors shall have chosen one of their number president and appointed a secretary and treasurer, it shall be deemed fully organized, and enjoy the powers conferred.

"SEC. 3. The said company shall have power to make insurance and take risks on all kinds of property, both marine and fire, and charge and receive such premiums as may be agreed by and between the
42 parties, either upon the mutual or stock principle, or both.

"SEC. 4. The company shall have power to use, invest, or loan its surplus funds in or on stocks, bottom'y, and respondentia, in bonds, mortgages, or personal security, at such rates as private persons may legally do by the laws of this State, and may increase its capital to five hundred thousand dollars.

"SEC. 5. The said company may establish agencies and do all acts not inconsistent with the constitution, the laws of this State or the United States, necessary to and for the full use and enjoyment, and to carry out the full objects of this act.

"SEC. 6. This act shall be deemed a private act, and be liberally construed for the purposes therein contained, and take effect from and after its passage.

"Approved February 4th, 1857.

"W'M H. BISSELL,
"*Governor.*
"SAMUEL HOLMES,
"*Speaker of the House.*
"JOHN WOOD,
"*Lieut. Governor, and Speaker of the Senate.*"

And the said counsel for the plaintiff, further to maintain said issue on his part, then produced and offered in evidence copies of papers on file in the office of the auditor of public accounts, and in the
43 office of secretary of state of the State of Illinois, duly certified by said officers, which said copies of papers are designated by the marks A, B, C, D, E, and F, and were respectively as follows:

A.

STATE OF ILLINOIS, DEPARTMENT OF INSURANCE, AUDITOR'S OFFICE.

OFFICE OF THE GREAT WESTERN INSURANCE COMPANY,
Chicago, Illinois, Aug. 22d, 1870.

We, the undersigned, directors of Great Western Insurance Company of Chicago, Illinois, being duly sworn according to law, depose and say, and each for himself says, that we compose a majority of the directors of the Great Western Insurance Company of Chicago, Illinois, aforesaid; that said Great Western Insurance Company has a capital stock of five

millions dollars, divided into fifty thousand shares of one hundred dollars. One million dollars of said capital is subscribed, and eighteen & $\frac{33}{100}$ (averaged) dollars upon each share, amounting in the aggregate to one hundred and eighty-six thousand three *three* hundred and thirty-five and $\frac{33}{100}$ dollars, has been paid in by the several holders of the stocks of said company, and said money has been paid in in cash by the
44 stockholders towards the payment of their respective shares, and not for any other purpose whatever; and it is intended that the same shall remain as the capital of the company and that the same is now invested as required by the laws of this State.

H. L. STEWART.	A. S. PECK.
JAMES MONTGOMERY.	M. SMITH.
H. H. PECK.	G. N. ARCHIBALD.
J. D. WOODWARD.	J. M. W. JONES.
R. J. WATERS.	E. EUGENE CADWELL.
C. D. HOOKER.	W. N. STURGES.
CHARLES J. STOKES.	CHARLES V. DYER.
WASHINGTON LIBBY.	J. MCKAY SAUGER.
CHARLES B. SMITH.	L. S. MAJOR, $5,000 stock, 20 per cent. paid in.

Subscribed & sworn to before me by each of the subscribers hereto on the 22nd day of August, 1870.

Given under my hand and official seal.

GEO. C. CHRISTIAN,
Notary Public.

Filed August 23d, 1870.

45 B.

NOTICE.

The Great Western Insurance Company of Chicago, Illinois, hereby give notice that it is the intention to increase its capital stock to five million dollars, three-fourths in amount of the stockholders thereof having given their written consent to such measure.

H. L. STEWART, *President.*

C. D. HOOKER, *Secretary.*

CHICAGO, ILL'S, *June* 25, 1870.

I, the undersigned, one of the publishers of the Chicago Tribune, do hereby certefy that a notice, of which the annexed is a true copy, was published for four successive weeks, to wit, four times in the daily edition of the Chicago Tribune, a newspaper published in the city of Chicago, and of general circulation throughout the county of Cook, and State of Illinois, and that the date of the first paper containing the same was the 29th day of June, A. D. 1870, and that the date of the last paper containing the same was the 20th day of July, A. D. 1870.

Dated at Chicago this 23d day of July, 1870.

[SEAL.] TRIBUNE CO. PUBLISHERS,
By J. F. FLYNN, *Cashier.*

[5-cent stamp.]

C.

We, the undersigned, stockholders in the Great Western Insur-
46 ance Company of Chicago, Illinois, do hereby assent to and express our desire that the capital stock of said company shall be increased to five millions of dollars.

STOCKHOLDERS.

Names.	Names.
H. L. Stewart.	E. C. Stevens.
C. D. Hooker.	J. D. Woodward.
H. H. Peck.	Frenando Jones.
Simon Chase.	James H. Rees.
Charles G. Stokes.	John W. Dean.
R. J. Waters.	A. S. Peck.
J. J. Foster.	Louie Nelker.
Cha's B. Smith.	O. D. Morris.
J. R. Shepherd.	J. B. Sullivan.
J. McK. Sauger.	Cass, Porter & Barrows.
Washington Libby.	Peter Caldwell.
J. S. Wallace.	Abram Van Duzen.
L. P. Sauger.	Luterlin, Classen & Co.
Benj. Carver.	Lewis Benedict.
Philip Wadsworth.	Frederick Herhold.
James Montgomery.	W. N. Sturgis.
John Lassen.	H. H. Newell.
Cha's V. Dyer.	A. B. Pullman.
John F. Eberhart.	T. Shulley.
Austin Crover.	A. C. Stewart.
O. L. Mann.	E. Eugene Cadwell.
J. M. W. Jones.	Mary C. Snager.
Robert H. Foss.	E. Van Buren.
Charles Shohn.	L. S. Major.
M. Smith.	

47 D.

GREAT WESTERN INSURANCE COMPANY CHARTER.

An act to incorporate the Great Western Insurance Company of Chicago, Illinois.

SEC. 1. Be it enacted by the people of the State of Illinois, represented in the general assembly, That William W. Danenhower, Jacob Russell, Thomas Hale, George Ely, Robert H. Foss, and their successors and associates, be, and are hereby, created a body corporate and politic, under the name and style of the Great Western Insurance Company, situated at Chicago, and by that name shall have and enjoy all the rights and privileges and immunities that other like corporations have, and be recognized in all courts of justice and equity in this State.

SEC. 2. When the said party and their associates shall have subscribed one hundred thousand dollars, paying in as a company-fund five per cent. on the amount subscribed, and securing the balance to be paid on demand, or otherwise, by approved judgment-notes, by hypothecated stock, mortgages on real estate in Cook County, or other satisfactory security, and shall have chosen nine directors, and those directors shall have chosen one of their number president, and appointed a secretary and treasurer, it shall be deemed fully organized, and enjoy the powers herein conferred.

48 SEC. 3. The said company shall have power to make insurance and take risks on all kinds of property, both marine and

fire, and charge and receive such premiums as may be agreed by and between the parties, either upon the mutual or stock principle, or both.

SEC. 4. The company shall have power to use, invest, or loan its surplus funds in or on stock, bottomry, & respondentia, in bonds, mortgages, or personal security, at such rates as private persons may legally do by the laws of this State, and may increase its capital to five hundred thousand dollars.

SEC. 5. The said company may establish agencies and do all acts not inconsistent with the constitution, the laws of this State or the United States, necessary to and for the full use and enjoyment, and to carry out the full objects of this act.

SEC. 6. This act shall be deemed a private act, and be liberally construed for the purpose therein contained, and take effect from and after its passage.

Approved February 4, 1857.

WM H. BISSELL,
Governer.
SAMUEL HOLMES,
Speaker of the House.
JOHN WOOD,
Lieut. Governer, and Speaker of Senate.

49 UNITED STATES OF AMERICA,
State of Illinois, ss:

I, Ozias M. Hatch, secretary of the State of Illinois, do hereby certify that the foregoing is a true copy of an enrolled law now on file in my office.

In witness whereof I have hereunto set my hand and affixed the great seal of state, at the city of Springfield, this 4th day of February, A. D. 1857.

OZIAS M. HATCH,
Sec'y of State.

Date of filing, June 28, '70.

E.

(Copy.)

Amendment to section 4: It is desired that the charter be amended so that section 4 (four) shall read: "The company shall have power to use, invest, or loan its surplus funds in or on stock, bottomry, and respondentia, in mortgages on personal securities, at such rate as private persons may legally do by the laws of this State, and may increase its capital to five millions of dollars."

Given under the seal of the Great Western Insurance Company this twenty-second day of June, 1870.

H. L. STEWART, *President.*

C. D. HOOKER, *Sec'y.*

F.

STATE OF ILLINOIS, ATTORNEY-GENERAL'S OFFICE,
Springfield, July 28th, '70.

50 I, Washington Bushnell, attorney-general of the State of Illinois, do hereby certify that I have examined the charter, amend-

ments thereto, proof of publication, and the accompanying papers in the matter of an increase of capital of the Great Western Fire-Insurance Company of Chicago, Illinois, to five millions of dollars, and I find said papers conformable to the act of the general assembly of the State of Illinois, approved March 11th, 1869, and entitled "An act to incorporate and govern fire, marine, and inland navigation insurance companies doing business in the State of Illinois," and not inconsistent with the laws and constitutions of the State of Illinois.

W. BUSHNELL,
Attorney-General of Ill's.

To General C. E. LIPPINCOTT,
Auditor P. A., Springfield, Illinois.

But the said counsel for the said defendant then and there objected to the introduction of such evidence, as follows:

To the affidavit of the directors marked "A," that it is immaterial, such affidavits not being required by the laws of said State of Illinois.

To the paper marked "B," purporting to be a publication of notice and the certificate proving that publication, that the publication was
51 not four weeks, as required by law, and that the proof by certificate is not sufficient; the proof should have been by affidavit.

To the paper marked "C," purporting to be an assent and expression of desire to increase the capital stock of said company to five million dollars, the objections are:

1st. That the notice of publication is not sufficient to authorize them to make this assent, it not being four weeks.

2nd. That there is no evidence that three-fourths of the stockholders assent, and that this paper should show before it can be used in evidence, (1st.) all the stockholders; (2d) the amount they held; (3d) the signatures of the amount of stock; again, it should appear (and it does not) that such three-fourths stockholders were of the original, and not the increased stock.

3d. These papers are not signed by any directors.

4th. These papers are not signed by the president and directors of the original company.

To the paper marked "F," purporting to be a certificate of conformity, the objection is, that there is no authority of law to attach it to these papers, and it is not in the language required by the law, nor of the facts required by the law to be certified.

And thereupon the said district judge declared and delivered
52 his opinion that the objection so taken by the counsel for the the defendant as aforesaid, ought not to be allowed, but that the said certified copies of papers, and each and every of them, ought to be admitted in evidence, and did accordingly decide that the same should be read in evidence on the part of said plaintiff; to which opinion and decision of said district judge the said counsel of said defendant did then & there, on behalf of said defendant, except.

And the said counsel for said plaintiff then read said certified copies of papers in evidence to said jury.

The said counsel for the said plaintiff, further to maintain and prove said issue on his part, then produced and offers in evidence a paper-writing purporting to be the third annual statement of the Great Western Insurance Company, filed in the office of public accounts, State of Illinois, showing their condition on the 31st day of December, 1870, and filed in the office the 27th day of February, 1871, duly certi-

fied by the proper officer, for the purpose of showing that the Great Western Insurance Company held out to the public that their capital stock subscribed there was $1,188,000.00.

53 Annual statement of the condition of the Great Western Insurance Company of Chicago, in the State of Illinois, for the year ending on the 31st day of December, 1870, made to the auditor of public accounts of the State of Illinois, pursuant to the laws of said State.

1.

CAPITAL.

The amount of capital stock of the company now outstanding (par value of shares $100 each) is $1,188,000.00; amount of unpaid subscribed capital, for which the subscribers or holders are liable, $965,169; amount of capital stock paid up, $222,831.

2.

Assets, showing the assets of the company.

3.

Liabilities, showing the liabilities of the company.

4.

Income, showing the income of the company.

5.

Expenditures, showing the expenditures of the company.

6.

Miscellaneous, showing the miscellaneous statistics respecting the company.

Schedule A & B, showing real estate owned by the company, and bonds and mortgages owned by the company.

Signed by HART L. STEWART, *President.*
C. D. HOOKER, *Secretary.*

54 To the introduction of which evidence the counsel for defendants then and there objected, for the reason—

1st. That a statement of the amount of capital stock subscribed is not required to be filed by the laws of the State of Illinois, and any such statement so filed is not binding on the defendant.

2nd. Because the proposed proof for the proposed object is immaterial in this case.

But the said district judge did then and there decide and give his opinion that the said objections so taken by the counsel for said defendant, as aforesaid, ought not to be allowed, but that the said statement ought to be admitted in evidence, and did accordingly decide that the

same should be read in evidence on the part of said plaintiff; to which said opinion and decision of the said judge the said counsel for the said defendant did then and there except. And said statement was then read in evidence by said plaintiff's counsel to said jury.

And the said plaintiff, further to maintain said issue on his part, then put in evidence the rule to show cause, and service on the defendant by the return of the marshal, and the petition in bankruptcy. Also
55 the adjudication in bankruptcy, made on the 6th day of February, A. D. 1872; also the notification and acceptance of the appointment as assignee on the 11th of April, 1872; also the order of the bankrupt court, calling in the unpaid capital stock by the 15th day of August, A. D. 1872; also the publication of the order in the Inter-Ocean, and the service of notice on this defendant.

And the said plaintiff, further to maintain the said issue on his part, then offered to prove by one P. G. Gardner that the company had an office in Chicago, and transacted business and issued policies of insurance, and transacted a general insurance business from 1870, in the summer, up to the time it was put into bankruptcy; that Hart L. Stewart was its president, and C. D. Hooker was its secretary, and the witness was its book-keeper; that the company had stockholders in different States, and had branch offices at various places, and among others a branch office at Grand Rapids, Michigan; that its books were destroyed by fire; that they had an original stock-ledger, which burned up on the 9th day of October, 1871; that before it was burned a transcript of the Grand Rapids stockholders was taken from it (as well as other stockholders in the country) and sent to the agent, Mr. Atwater, at
56 Grand Rapids, for the purpose of collecting up the unpaid assessments, and that after the fire it was returned to Chicago, and from that and like lists that had been sent out to other places this present stock-ledger was made up and used by the company from that time until they were put into bankruptcy; which said testimony of said witness Gardner was admitted in evidence before said jury; and said witness Gardner also testified that this stock-ledger, produced in court, was only made up from the sheets returned by the agents outside of Chicago, and that the lists of stockholders in Chicago were not made up from any lists that they had, and were not accurate in all respects, so far as the Chicago stockholders were concerned, but were made up from the best information they could obtain; that as to the stockholders in the country outside of Chicago the book was correct, and the witness then produced and identified the transcript of the Grand Rapids stockholders, which he said was taken from the original stock-ledger, and the same was produced and read in evidence with said stock-ledger to show that the defendant there appeared as a stockholder to the amount of six thousand dollars, and that the company treated him as a stockholder.

57 And the said plaintiff, further to maintain said issue on his part, then offered the stock-ledger, made up as stated by the witness Gardner, in evidence, and offered to read the same in evidence to said jury.

To the introduction of which as evidence the counsel for the said defendant did, on his behalf, then and there object, for the reason (1st) that it is irrelevant; (2d) that it is incompetent. The stock-ledger is incompetent as evidence in this case, made up, as the witness has testified, from copies of copies.

This book is not the best evidence of what those transcripts contained which were transcripts of the original stock-book.

The counsel for the said defendant also then and there objected to any testimony being introduced in this case going to show any liability on the part of the defendant for unpaid assessments, for the reason that the stock which the plaintiff claimed was issued to and held by the defendant was subscribed for under the plaintiff's claim under the general law of the State of Illinois known as the general insurance law, and by virtue of that law no assessment of stock can be made upon any stockholders until the full amount of the capital of the company
58 has been subscribed, which has not been shown in this case.

But the said district judge did then and there declare and give his opinion that the said objections ought not to be allowed, but that the said stock-ledger ought to be admitted in evidence, and that testimony ought to be introduced in said cause going to show liability of the defendant for unpaid assessment on stock without said plaintiff showing that the full amount of the capital of the Great Western Insurance Company had been subscribed, and did accordingly decide that the said stock-ledger should be read in evidence on the part of said plaintiff; to which opinion and decision of said district judge the counsel of said defendant did, in his behalf, then and there except. And the said stock-ledger was there read in evidence by the counsel for said plaintiff to said jury.

And the said plaintiff, further to maintain said issue on his part, then produced one J. K. Philo, who, being sworn, said he had been employed as special agent by the Great Western Insurance Company for some months before the Chicago fire in 1871, up to the time they were
59 put into bankruptcy. That they had an office in Chicago, transacted a general insurance business, issued a large number of policies, and met with heavy losses in the great Chicago fire; and on the behalf of said plaintiff was by the said plaintiff's counsel shown a small pamphlet, purporting to have been printed in 1871, containing a statement of capital stock as $5,000,000, subscribed capital $1,188,000.00, cash capital $222,831.00, the names of the officers, a statement respecting the company, a printed copy of its charter and by-laws, and a list of its directors and stockholders, concerning which the witness testified that the company issued an edition of that work; that they were for general distribution wherever they were doing business; that he distributed some himself, and found some distributed in this State after the great fire in the offices of their agents. The said counsel for the plaintiff then offered to read said pamphlet in evidence to the jury for the purpose of showing their representations to the public and to show that M'r Chubb was held out as a director of the company and a stockholder at the Grand Rapids branch of Grand Rapids stockholders.

60 To the introduction of which the said counsel for the defendant then and there objected, for the reason that it was irrelevant and immaterial for the purpose as stated, simply that they held him out to the public as a stockholder, and no further statement that he proposes to connect it with the defendant.

But the said district judge did then and there declare and give his opinion that the said objection ought not to be allowed, and did decide that the said pamphlet ought to be admitted in evidence; to which ruling and decision the said counsel for said defendant did then and there except; and said counsel for said plaintiff did then and there read said pamphlet in evidence to said jury.

And the said plaintiff, further to maintain the said issue on his part, produced and showed to said witness a paper-writing purporting to be a policy of insurance of the Great Western Insurance Company, and numbered 14780, bearing date July 8th, 1871, and having printed thereon "Proposed capital, $5,000,000.00;" subscribed capital, $1,000,000.00; concerning which said witness testified: This is one of the policies
61 they issued; this is one of the forms in which they issued policies; they had two forms; this was in general use for dwelling-houses, or property of that kind, not specially hazardous.

The counsel for the said plaintiff then offered to read said policy and the printed matter thereon as to capital stock to show that they issued policies and to show the form thereof, and also to show that they represented on the policies that they issued that they had a proposed capital of $5,000,000.00 and an actually-subscribed capital of $1,000,000.00

To the introduction of which for the purpose of showing that they represented on their policies which they issued that they had a proposed capital of $5,000,000 and a subscribed capital of $1,000,000 counsel for the defendant did there and then object, for the reason that it is incompetent testimony for the purpose offered.

But the said district judge did there and then declare and give his opinion that the said objection ought not to be allowed, but that the said testimony ought to be admitted, and did accordingly decide that the same ought to be read in evidence; to which said ruling and decision said defendant, by his counsel, did then and there except,
62 and the said policy and printed matter as to capital was then read in evidence to said jury on behalf of said plaintiff.

The said plaintiff, further to maintain said issue on his part, then read in evidence to said jury a certificate of stock held by the defendant, as follows:

THE GREAT WESTERN INSURANCE COMPANY.

Number 1037. Shares 50.

Capital stock $500,000.00, with liberty to increase to 5,000,000 dollars. Organized July 20th, 1857, under act of legislature approved March 4th, 1857.

This to certify that A. L. Chubb is entitled to fifty shares in the capital stock of the Great Western Insurance Company of Chicago, Ill's, of one hundred dollars each, of which twenty per cent. is payable as follows: Five per cent. on receipt of stock-certificate, five per cent. in three months from date hereof, five per cent. in six months from date hereof, five per cent. in nine months from date hereof; transferable only on the books of the company in person or by attorney on the surrender of this certificate, being subject to the charter and by-laws of said corporation and laws of the State of Illinois.

63 Dated at Chicago, this 25th day of November, in the year of our Lord one thousand eight hundred and seventy.

C. D. HOOKER, *Secretary.*

H. L. STEWART, *President.*

Across the face: (Non-assessable.)

The witness Philo further testified that he visited Grand Rapids on behalf of the plaintiff on March 17th, 1873, before suit was brought,

and made demand upon him personally—on the defendant—for the balance of his subscription to stock as shown on the books of the company, $4,200.00. He admitted that he owned the stock, but refused to make any further payment. It was then admitted that defendant remitted money to the company to apply on stock held by him February 5th, 1872. It was admitted by the defendant that the company had a branch at Grand Rapids, and that the branch held meetings of stockholders in which the defendant participated; that he was the president of the branch and took part in a meeting of the stockholders and directors of the company held at Chicago in 1871—January; and that he held the certificate of stock read in evidence for fifty shares, and that it was for the increased stock. It was further admitted that he became the holder of such stock November 25th, 1870. It was also
64 admitted that while he was such holder of stock, at one time the defendant signed a proxy to L. R. Atwater to attend and vote at a stockholders' meeting of the company in Chicago. And the said defendant, to maintain and prove said issue on his part, then read in evidence to said jury a certified copy of the charter of the Great Western Insurance Company, filed in the office of the secretary of state at Lansing, Michigan, on the 12th day of July, A. D. 1870, as follows:

CHARTER.

An act to incorporate the Great Western Insurance Company, Chicago, Illinois.

SEC. 1. Be it enacted by the people of the State of Illinois, represented in the general assembly, That William W. Danenhower, Jacob Russell, Tho's Hale, George Ely, Robert H. Foss, and their successors and associates, be, and are hereby, created a body corporate and politic, under the name and style of the Great Western Insurance Company, situated at Chicago, and by that name shall have and enjoy all the rights and privileges and immunities that other like corporations have, and be recognized in all courts of justice and equity in this State.

SEC. 2. When the said party and their associates shall have
65 subscribed one hundred thousand dollars, paying in as a company-fund five per cent. on the amount subscribed, and securing the balance to be paid on demand, or otherwise, by approved judgment-notes, by hypothicated stock, mortgages on real estate in Cook County, or other satisfactory security, and shall have chosen nine directors, and those directors shall have chosen one of their number president, and appointed a secretary and treasurer, it shall be deemed fully organized, and enjoy the powers herein conferred.

SEC. 3. The said company shall have power to make insurance and take risks on all kinds of property, both marine and fire, and charge and receive such premiums as may be agreed by and between the parties, either upon the mutual or stock principle, or both.

SEC. 4. The company shall have power to use, invest, or loan its surplus funds in or on stocks, bottom'y, and respondentia, in bonds, mortgages, or personal security, at such rates as private persons may legally do by the laws of this State, and may increase its capital to five hundred thousand dollars.

SEC. 5. The said company may establish agencies and do all
66 acts not inconsistent with the constitution, the laws of this State or of the United States, necessary to and for the full use and enjoyment, and to carry out the full objects of this act.

SEC. 6. This act shall be deemed a public act, and shall be liberally construed for the purposes therein contained, and take effect from and after its passage.

Approved February 4th, 1857.

W'M H. BISSELL,
Governor.
SAMUEL HOLMES,
Speaker of the House.
JOHN WOOD,
Lieut. Governor and Speaker of the Senate.

UNITED STATES OF AMERICA,
State of Illinois, ss:

I, Ozias M. Hatch, secretary of state of the State of Illinois, do hereby certify that the foregoing is a true copy of an enrolled law on file in my office.

In witness whereof I have hereunto set my hand and affixed the great seal of State, at the city of Springfield, this 4th day of February, A. D. 1857.

OZIAS M. HATCH,
Sec'ry of State.

And further to maintain said issue on his part, said defendant read in evidence to said jury a statement of said company filed in the office of the secretary of the state of Michigan on the 12th day of July,
67 1870, showing that this company had a full-paid capital stock of $173,576.43 and an unpaid but subscribed capital of $867,882.15, and that it was doing business under an act of incorporation of February 4th, 1857, and commenced doing business July 1st, 1870.

And said defendant, further to maintain said issue on his part, then read in evidence the pamphlet which was used by the company in 1870, and exhibited to the defendant in this suit at the time the stock was sold to him.

And further to maintain said issue on his part, the said counsel for said defendant then read in evidence the following stipulation, signed by the attorneys of the respective parties in this suit, properly entitled, as follows, namely:

UNITED STATES OF AMERICA:

The circuit court of the United States for the sixth circuit and western district of Michigan.

CLARK W. UPTON, ASSIGNEE,
vs.
A. LAMONT CHUBB.

In this cause it is hereby stipulated that depositions by and on behalf of either party may be taken before Lawrence Proudfoot, esq.,
68 United States commissioner for the northern district of Illinois, at his office, in the city of Chicago, in said State, commencing on the 10th day November, A. D. 1874, and thence proceeding as shall suit the convenience of the said commissioner. That said depositions may be taken down and reduced to writing by a stenographer, to be agreed upon by the attorneys of the respective parties, at the expense of the

party calling the witness. That either party may produce before such commissioner such witnesses as they may be advised or desire. That subpœnæs may be issued to compel the attendance of said witnesses. That said witnesses may be examined and cross-examined before said commissioner. That only the depositions of *each* witnesses as reside more than one hundred miles from the place of holding said court at which said cause is to be tried shall be taken under this stipulation, and such depositions are to be taken de bene esse under the authority of the act of Congres in such case made and provided. That all notices of the taking of said depositions of said witnesses required by said act of Congress are hereby waived, and all formality in the taking, certifying, and return of said depositions are hereby waived; and also
69 any informality in the taking, certifying, and return of said depositions are hereby waived. That said depositions shall be filed with the clerk of this court in said cause, and may be read in evidence on the trial thereof by either, subject to any objection made by either party when so offered to be read in evidence of incompetency, irrelevancy, immateriality. That this stipulation shall be annexed to and returned with said depositions.

Dated September 23d, 1874.

And the said counsel for the said defendant, further to maintain and prove the said issue on his part, offered to read in evidence the depositions of James H. Rees, Evart Van Buren, Charles V. Dyer, Nicholas P. Iglehart, J. McKay Sanger, Fernando Jones, John F. Eberhart, J. Seely Wallace, Orin L. Mason, J. M. W. Jones, Robert H. Foss, and Lewis Benedict, taken before Lawrence Proudfoot, esq., under & in pursuance of said stipulation, and returned to this court for the object and purpose, as stated by said counsel for said defendant, of substantiating the fact set up in defendant's plea and notice with reference to
70 the stock being spurious that was sold to defendant, and for further purpose of showing that the originals of the paper documents introduced on the part of the plaintiff in this suit relative to increasing the stock of this company are forged, fraudulent, & void, and that the persons who pretended to assent to the increase of stock had no authority so to do. And that the defendant had no notice or knowledge of the falsity of said representations until after the bankruptcy of said company, nor until after the commencement of this suit.

The court here enquired of said counsel for said defendant as follows: Do you propose to follow that up with proof that the defendant offered previously to the bankruptcy of the corporation to surrender his stock? To which inquiry the counsel for the defendant replied: "No; that is stated in the plea. That as soon as he discovered it he repudiated it, some time in November last."

To the introduction of which said evidence for the object and purpose stated the counsel for said plaintiff did then and there object.

And the said district judge did then and there declare and give his opinion that the said objection of said counsel for said plaintiff
71 ought to be allowed, & that the said depositions of said witnesses ought not to be admitted in evidence for the object and purpose stated by the said counsel for said defendant, and did accordingly exclude said evidence from said jury. To which ruling and decision the said counsel for said defendant did then and there except.

And the said defendant, further to maintain and prove said issue on his part, then produced as a witness A. Lamont Chubb, who was duly sworn in said cause, and the said counsel for the said defendant pro-

posed to prove by said witness that the defendant was induced to purchase the stock, an assessment upon which is sued for in this case, solely by and through the representations of the Great Western Insurance Company, as follows, viz: That by a resolution of the board of directors of said company, before that duly passed, the said company authorized its agents to sell stock upon express conditions that the buyer should pay but twenty per cent. of face value of the stock bought, and that the remaining eighty per cent. should never be paid except by the profits of the business; that by virtue of its special charter and the amendments thereto, said company had power and authority to make such
72 contracts, and that by such special charter and amendments such contract was legal, valid, and obligatory, and that because of such charter and amendments no more than twenty per cent. could in any event be collected by said *the* company or any of its legal representatives, which representations were false in this, to wit: No such authority was conferred by the charter and its amendments, and no such consequences follow the making of such purchase, and that the defendant had no notice or information nor knowledge of any facts to put them upon inquiry touching the truth or falsity of said representations until after the bankruptcy of said company, nor until after the commencement of this suit.

To the introduction of which evidence the said counsel for the said plaintiff did then and there object, for the reason that although it might be a valid agreement between the company and a stockholder it is not valid in this action between the assignee and this defendant, and then, even if true, taken in connection with the admitted and undisputed facts, it would not constitute a defense, and the defendant would
73 be estopped from setting up such a defense.

And the said district judge did then and there decide that said evidence so offered ought not to be admitted in evidence in said cause, and did then and there decide that the same should not be admitted in evidence, and the same was accordingly excluded. To which ruling and decision of said district judge the said counsel for the defendant did then and there except.

And the said counsel for said defendant, further to maintain said issue on his part, then proposed and offered to prove by the said witness and other evidence that the defendant was induced to purchase the stock, an assessment upon which is sued for in this cause, by and through the following representations of the Great Western Insurance Company, namely: That the company had power and authority, by virtue of its charter and amendment, to issue valid and valuable stock, which was false, and they had no such power, and that defendant had no notice, knowledge, or information touching the falsity of said representations until after the bankruptcy of said corporation, nor until after the commencement of this suit.

To the introduction of which testimony, offered as aforesaid, the said counsel for the plaintiffs did then and there object.

74 But the said district judge did then and there declare and give his opinion that the said evidence was inadmissible, and did accordingly decide that said evidence should not be admitted or proved before said jury, and did exclude the same.

To which ruling and decision the said counsel for the said defendant did then and there except.

And the said counsel for said defendant, further to maintain and prove said issue on his part, then proposed and offered to prove by the said witness, A. Lamont Chubb, and by other testimony, that the said de-

fendant was induced to purchase the stock, an assessment upon which is sued for in this case, by and through the following representations of the Great Western Insurance Company, namely: That said company had five millions of dollars of authorized stock, which was false, and that said defendant had no knowledge or notice of the falsity of such representations until after the bankruptcy of said company, nor until after the commencement of this suit.

To the introduction of which testimony the said counsel for the said plaintiff did then and there object.

And the said circuit judge did then and there declare and give
75 his opinion that said testimony should not be admitted, and did accordingly decide that said testimony should be admitted or introduced in evidence to said jury.

To which ruling and decision the said counsel for the defendant did then and there except.

And the said defendant, further to maintain and prove said issue on his part, then and there offered to prove by said witness, A. Lamont Chubb, that the defendant was induced to purchase the stock, an assessment upon which is sued for in this case, by and through the following representations of the Great Western Insurance Company, namely: That the company had a subscribed capital of one million dollars, and that James H. Rees, J. M. W. Jones, Fernando Jones, J. Seeley Wallace, and Philip Wadsworth were stockholders in said company; that the management was in the hands of the best men in Chicago, such as J. McKay Sanger, Philip Wadsworth, J. Seeley Wallace, and J. M. W. Jones; that said individuals were known to said defendant, some personally and some by reputation, and, relying upon the truth of said statements, defendant purchased the stock, the assessment upon which is in suit; that all of said representations were false; that none of the parties named were either stockholders or directors of said company; and that said defendant had no notice or knowledge of the falsity
76 of said representations until after the bankruptcy of said company, nor until after the commencement of this suit.

To the introduction of which testimony the said counsel for said plaintiff did then and there object.

And the said circuit judge did then and there declare and give his opinion that the said testimony was inadmissible, and did accordingly decide that said testimony ought not to be admitted, and the same was then and there excluded from said jury.

To which ruling and decision the said counsel for said defendant did then and there except.

And, further to maintain said issue on his part, the said defendant then offered to show and prove that 80 % was never to be paid, according to a resolution of the company passed previous to defendant's purchasing stock, and that he purchased under representation of that fact.

To the introduction of which proof the counsel for the plaintiff then and there objected.

And the said district judge did then and there decide that such proof ought not to be admitted; to which ruling and decision the counsel for the defendant did then and there except.

The said counsel for the said defendant did then and there conclude and admit the following facts: That the defendant held a certifi-
77 cate of what purported to be *a* stock in the Great Western Insurance Company for five thousand dollars of the increased stock, from Nov. 25th, 1870, up to the bankruptcy of the corporations; that

he gave a proxy to L. R. Atwater to attend to the annual meeting of the directors of said company in January, 1871; that he paid thirty per cent. on the stock held by him, and that he was president of the Grand Rapids branch of the Grand Rapids stockholders. And the said counsel for the said defendant, further to maintain and prove said issue on his part, then offered to read in evidence to said jury the depositions, taken under the aforesaid stipulation in this cause, of James H. Rees, Evart Van Buren, Charles V. Dyer, Nicholas P. Iglehart, Frenando Jones, John F. Eberhart, J. McKay Sanger, J. Seeley Wallace, Oren L. Mann, J. M. W. Jones, Robert H. Foss, and Lewis Benedict, for the purpose of showing that the stock of the company, as it was originally organized under its charter, was one hundred thousand dollars, and was fully subscribed and taken; and nine directors were chosen, and James H. Rees elected president of said company, and that the holders of this one hundred thousand dollars stock in this company never increased their capital stock, nor authorized its increase; that this com-
78 pany ceased to do business entirely prior to 1868; that this original one hundred thousand dollars of stock in said company was not transferred to the company who claimed to re-organize and increase the capital stock of said company, or to any individual or individuals who claim to have re-organized and increased the capital stock, and for the purpose of showing that there was no valid transfer of the original stock, franchise, charter, or charter rights by the Great Western Insurance Company as it was organized in February, 1857, at or before the time of the pretended increase of the capital stock made by the parties who claimed to have received this transfer.

But the said counsel for the said plaintiff did then and there object to this introduction of said evidence, on the ground that it is incompetent and irrelevant, even if true, taken in connection with the admission made; that it would constitute no defense; that defendant is estopped from setting up such a defense.

And the said district judge did then declare and give his opinion that said testimony was inadmissible, and did accordingly decide that said testimony should not be admitted in evidence before said jury, and accordingly excluded said depositions.

To which ruling and decision the said counsel for the said de-
79 fendant did then and there except. And on the trial of the cause aforesaid before said jury as aforesaid the evidence set forth and contained in the foregoing bill of exceptions is all the evidence that was introduced in said cause tending to prove that defendant was a subscriber, or had ever subscribed to or for any of the capital stock of said Great Western Insurance Company; and said bill of exceptions contains all the evidence introduced before said jury on said trial tending to prove that any creditor who had proved his claim in bankruptcy as a creditor of the Great Western Insurance Company became a creditor of the Great Western Insurance Company on the strength of defendant's having stock in said company, or of his name having appeared among the stockholders of said company, or of his having attended a meeting of the directors of said company, or of his having given a proxy to L. R. Atwater to attend a meeting of the stockholders or directors, or of his having paid thirty per cent. on stock held by him, or on account of his being or having been the president of the Grand Rapids branch of the Grand Rapids stockholders; or on account of said company representing in the pamphlets and policies which they issued that they had an authorized capital of $5,000,000.00 and a

80 subscribed capital of $1,188,000.00, or a proposed capital of $5,000,000.00 and a subscribed capital of $1,000,000.00.

And the said district judge did then and there also further declare and deliver his opinion to said jury, as follows, namely:

GENTLEMEN OF THE JURY: The bankrupt corporation represented by the plaintiff was chartered by the legislature of the State of Illinois, in 1857, and went into operation I think in 1859. The legislature of that State, in 1869, authorized an increase of the capital stock of all existing fire-insurance corporations upon certain proceedings to be taken for that purpose. For the purpose of showing compliance with the provisions of the statute, certain copies of papers certified by the proper public officers, under seal of the State, have been introduced with a view of showing the steps taken to increase the stock of the Great Western Insurance Company of Chicago up to five millions of dollars, and for the purpose of showing also that a million or more dollars had been subscribed. This evidence I instruct you is conclusive as to the facts recited in these documents. There is evidence in this case tending to show that the company issued policies of insurance from July, 1870, up to the time of the great fire in October, 1871, in Chicago; and that it did business as an insurance company during that time,

81 and held itself out to the public as an incorporated company authorized to transact the business of insurance; that it issued pamphlet-circulars representing its proposed capital, and actually-subscribed capital, and the amount paid in upon the stock subscribed. If you find such to be the facts, then I instruct you the Great Western Insurance Company was a corporation authorized to do an insurance business, and its acts and doings, so far as regards its stockholders, would be binding upon them for all the purposes of this action.

There is evidence tending to show, and indeed it is admitted, that defendant became the holder of stock November 25th, 1870, of five thousand dollars of the increased capital stock of this company; and there is some evidence tending to show that he held an additional thousand dollars, but there is no admission to that fact. I do not say that there is evidence to show it, but I say there is some evidence tending to show that he had an additional thousand dollars. It will be for the jury to determine whether he was in fact the holder of five thousand dollars, or any less or greater amount of the capital stock of that company. It is admitted that defendant paied thirty per cent. upon the stock which he held, all but six hundred dollars of which were paid before the bankruptcy of the corporation, and that sum after its

82 bankruptcy. That defendant was president of the Grand Rapids branch of the stockholders; that he gave a proxy to Atwater to attend the annual stockholders' meeting of the company at Chicago in January, 1871, and also that he attended a directors' meeting of the company in January, 1872, and participated in the business of that meeting. Upon this testimony, so far as it is not admitted, outside of the documentary evidence certified from the state department of Illinois, the facts are for the jury to find. So far as the facts are admitted, of course that concludes both parties.

Now, if you find as facts what I have referred to as evidence in the case, taken in connection with the admissions, the defendant is estopped to deny his liability as a stockholder to the extent of any stock which he may have been shown or admitted to hold in this company; and less the amount which he has paid upon that stock, this plaintiff would be entitled to recover, together with interest upon the amount of his unpaid stock, at six per cent. from the 15th day of August, 1872, to this

time. I think I ought to add, in justice to the defendant, as well as to the plaintiff, that under such a state of facts, with such admissions as are made in this case, there is very little else for the jury to do than to determine the amount of stock which Mr. Chubb held in that corporation, less what *what* he has paid, and render verdict for *for*
83 the plaintiff for the balance. Having excluded a large portion of the testimony offered by the defense, it leads to the practical result. At the same time I do not take the case out of the hands of the jury, so far as any facts are submitted to them, and the facts are all submitted for the jury to pass upon; regarding the admissions, however, as matters that the jury cannot find against, and regarding the documentary evidence, certified to from the state department of Illinois, as matters which the jury cannot find against, because they are conclusive. You may take the case, gentlemen, and say what you find, if anything, for the plaintiff.

To which last opinion of the said district judge the said counsel for the said defendant did then and there, on behalf of said defendant, except as follows:

To those portions of the charge of the judge to the jury in this case given in the words following: "The legislature of that State, (Illinois,) in 1869, *offered* an increase of the capital stock of all existing fire-insurance corporations upon certain proceedings to be taken for that purpose. For the purpose of showing compliance with the provisions of the
84 statute, certain certified copies of papers, certified by the proper public officers under the seal of the State, have been introduced with a view of showing the steps taken to increase the stock of the Great Western Insurance Company of Chicago up to five millions of dollars, and for the purpose of showing also that a million or more dollars had been subscribed. This evidence I instruct you is conclusive as to the facts recited in these documents."

1st. The defendant excepts to that portion of the above-quoted charge which is in these words: "This evidence, I instruct you, is conclusive as to the facts recited in these documents."

2nd. "There is evidence in this case tending to show that the company issued policies of insurance from July, 1870, to the time of the great fire in October, 1871, in Chicago; and that it did business as an insurance company during that time, and held itself out to the public as an incorporated company authorized to transact the business of insurance; that it issued pamphlet-circulars representing its proposed capital, and actually-subscribed capital, and the amount paid in on the stock subscribed. If you find such to be the facts, then I instruct you that the Great Western Insurance Company was a corporation authorized
85 to do an insurance business, and its acts and doings, so far as regards its stockholders, would be binding upon them for all the purposes of their action."

The defendant excepts to that portion of the above-quoted charge which is in these words: "If you such to be facts, then I instruct you that the Great Western Insurance Company was a corporation authorized to do an insurance business, and its acts and doings, so far as regards its stockholders, would be binding upon them for all the purposes of this action."

3d. There is evidence tending to show, and, indeed, it is admitted, the defendant became the holder of stock November 25th, 1870, of five thousand dollars of the increased capital stock of this company, and there is some evidence tending to show that he held an additional thousand dollars, but there is no admission as to that fact. I do not say

there is evidence to show it, but I say there is some evidence tending to show that he held an additional thousand dollars. It will be for the jury to determine whether in fact he was the holder of five thousand dollars, or any less or greater amount, of the capital stock of that company. It is admitted that the defendant paid thirty per cent. upon the stock which he held, all but six hundred dollars of which were paid before the bankruptcy of the corporation, and this sum after its bankruptcy, that defendant was president of the Grand Rapids branch of the stockholders; that he gave a proxy to Atwater to attend the
86 annual stockholders' meeting of the company at Chicago in January, 1871, and also that he attended a directors' meeting of the company in January, 1872. Upon this testimony, so far as it is not admitted outside of the documentary evidence certified from the State department of Illinois, the facts are for the jury to find; so far as the facts are admitted, that of course concludes both parties.

Now, if you find as facts what I have referred to as the evidence in the case, taken in connection with the admissions, the defendant is estopped to deny his liability as a stockholder to the extent of any stock which he may have been shown or admitted to hold in this company, and less the amount which he has paid upon that stock. This plaintiff would be entitled to recover, together with interest on the amount of his unpaid stock at six per cent. from the 15th day of August, 1872, to this time.

The defendant expects to that portion of the above-quoted charge which is in these words: "Now if you find as facts what I have referred to in the evidence in the case, taken in connection with the admissions, the defendant is estopped to deny his liability as a stockholder."

4th. And the facts are all submitted for the jury to pass upon, regarding the admissions, however, as matters that the jury cannot
87 find against, and regarding the documentary evidence certified from the State department of Illinois as matters which the jury cannot find against, because they are conclusive.

The defendant excepts to that portion of the above-quoted charge which is in these words: "And regarding the documentary evidence certified from the state department of Illinois as matters which the jury cannot find against, because they are conclusive."

And the said district judge, under the charge and with the directions aforesaid, left the aforesaid issue and the evidence so given on the trial thereof as aforesaid to the said jury, and the jury aforesaid then and there gave their verdict for the said plaintiff, and assessed his damages on occasion of the premises at the sum of three thousand and nine hundred and ninety-one dollars and seventy-five cents. Because none of the exceptions so offered and made to the opinion and decision of the said district judge do appear upon the record of the said trial, therefore, on the prayer of said defendant, by his said counsel, the said district judge hath signed this bill of exceptions this 18th day of December, A. D. 1874.

S. L. WITHEY,
Dist. Judge.

88 WESTERN DISTRICT OF MICHIGAN, *ss:*

I, Isaac H. Parrish, clerk of the circuit court of the United States for the sixth circuit and western district of Michigan, do hereby certify that I have compared the above and foregoing with the records and files in said cause in my office, and that the same are true copies thereof and of the whole of such originals.

Witness my official signature, and the seal of said court, this 10th day of September, A. D. 1875.

[SEAL.] ISAAC H. PARRISH.

Fees for copy:

Writ of error	1 00
201 fol's, @ 10	20 10
	21 10
Certificate	50
	21 60
Express charges	1 00
	22 60

Received payment.

(Indorsed:) U. S. circuit court, western dist. of Mich. Clark W. Upton, assignee, vs. A. Lamont Chubb. Bill of exceptions. Filed April 28th, 1875. Isaac H. Parrish, clerk. Champlin, Butterfield and Fitz Gerald, att'y for def'd't.

(Indorsement on cover:) No. 124. A. Lamont Chubb, plaintiff in error, vs. Clark W. Upton, assignee of the Great Western Insurance Company, a bankrupt. W. Michigan C. C. U. S. Filed 17th September, 1875.

UNITED STATES OF AMERICA.

SUPREME COURT,

A. LAMONT CHUBB, *Plaintiff in Error,* *vs.* CLARK W. UPTON, ASSIGNEE OF THE GREAT WESTERN INSURANCE COMPANY, A BANKRUPT, *Def't in Error.*	OCTOBER TERM, 1877. No. 124.

Error to the Circuit Court of the United States for the Western District of Michigan.

BRIEF FOR PLAINTIFF IN ERROR.

J. W. CHAMPLIN,
Att'y for Plt'ff in Error.

SUPREME COURT

OF THE UNITED STATES.

A. LAMONT CHUBB,
Plaintiff in Error,
vs.
CLARK W. UPTON, ASSIGNEE OF THE GREAT WESTERN INSURANCE COMPANY, A BANKRUPT,
Def't in Error.

Errors to the Circuit Court of the United States for the Western District of Michigan.

Statement of Case.

In the year 1857, the Legislature of the State of Illinois, passed an Act as follows:

"An Act to incorporate the Great Western Insurance Company of Chicago, Illinois."

Section 1. Be it enacted by the people of the State of Illinois, represented in the general assembly, that *William W. Dunenhower, Jacob Russell, Thos. Hale, George Ely, Robert H. Foss*, and their successors and associates be, and are hereby created a body corporate and politic, under the name and style of the Great Western Insurance Company, situated at Chicago, and by that name shall have and enjoy all the rights and privileges and immunities that other like corporations have, and be recognized in all courts of justice and equity in this State.

Sec. 2. When the said party and their associates shall have subscribed one hundred thousand dollars, paying in as a company fund five per cent. on the amount subscribed, and securing the balance to be paid on demand or otherwise, by approved judgment notes, by hypothecated stock, mortgages on real estate in Cook County, or other satisfactory security, and shall have chosen nine directors, and those directors shall have chosen one of their number President, and appointed a Secretary and Treasurer, it shall be deemed fully organized, and enjoy the powers herein conferred.

Sec. 3. The said company shall have power to make insurance and take risks on all kinds of property, both marine and fire, and charge and receive such premiums as may be agreed by and between the parties, either upon the mutual or stock principle, or both.

Sec. 4. The company shall have power to use, invest, or loan its surplus funds in or on stocks, bottomry, and respondentia, in bonds, mortgages, or personal security, at such rates as private persons may legally do by the laws of this State, and may increase its capital to five hundred thousand dollars.

Sec. 5. The said company may establish agencies, and do all acts not inconsistent with the constitution, the laws of this State, or of the United States, necessary to and for the full use and enjoyment, and to carry out the full objects of this act.

Sec. 6. This act shall be deemed a private act, and shall be liberally construed for the purposes therein contained, and take effect from and after its passage

Approved February 4th, 1857.

WM. H. BISSEL,
Governor.

SAMUEL HOLMES,
Speaker of the House.

JOHN WOOD,
Lieut. Gov and Speaker of the Senate.

That in the year 1869, the Legislature of the State of Illinois passed an act entitled, "An Act to incorporate and to govern Fire, Marine, and Inland Navigation Insurance Companies, doing

business in the State of Illinois," which so far as is material to the subject under consideration, is as follows:

Sec. 3. Such persons shall file in the office of the Auditor of Public Accounts a declaration, signed by all the corporators, expressing their intention to form a company for the purpose of transacting the business of insurance, as expressed in the first section of this act, which declaration shall also comprise a copy of the charter proposed to be adopted by them; and shall publish a notice of such their intention, once in each week for at least four weeks, in a public newspaper in the county in which such insurance company is proposed to be located.

Sec. 7. It shall and may be lawful for the individuals associated for the purpose of organizing any company under this act, after having published the notice and filed the declaration and charter, as required by the third section of this act, and also on filing in the office of the Auditor of Public Accounts proof of such publication by the affidavit of the publisher of such newspaper, his foreman or clerk, to open books for subscription to the capital stock of the company so intended to be organized, and to keep the same open until the full amount specified in the charter is subscribed.

Sec. 10 The charter and proof of publication herein required to be filed by every such company, shall be examined by the Attorney General, and if found conformable to this act, and not inconsistent with the constitution and laws of this State, shall be certified by him to the Auditor of Public Accounts, who shall thereupon cause an examination to be made, either by himself or by three disinterested persons especially appointed by him for that purpose, who shall certify, under oath, that the capital herein required of the company named in the charter, according to the nature of the business proposed to be transacted by such company, has been paid in, and is possessed by it in money, or in such stocks and bonds and mortages as are required by the 8th section of this act. * * * And the corporators and officers of such company shall be required to certify, under oath, that the capital exhibited to those persons is *bona fide* property of the company. Such certificates shall be filed in the office of the said Auditor, who shall thereupon deliver to such company a certified copy of the charter and of said certificates, which on being filed in the office of the clerk of the county where

the company is to be located, shall be their authority to commence business and issue policies; and such certified copy of the charter and said certificates may be used in evidence for or against said company, with the same effect with the originals, and shall be conclusive evidence of the fact of the organization of such company.

Sec. 18. Any existing fire insurance company, and any company formed under this law, may at any time increase the amount of its capital stock, after notice given once a week for four weeks in any newspaper published in the county where such company is located, of such intentions, with a written consent of three-fourths, in amount, of its stockholders, unless otherwise provided in its charter, * * by altering or amending their charter in this respect, and filing a copy of their charter so amended, together with a declaration, under its corporate seal, signed by its president and directors, of their desire so to do, with such written consent of three-fourths in amount of its stockholers, * * to such increase in the office of the Auditor of Public Accounts, and upon the same proceedings had as are required by the tenth section of this act.

Sec. 19. All insurance companies heretofore organized in the State of Illinois, and now doing business in this State, are hereby brought under all the provisions of this act except that their capitals may continue of the amounts and character named in and authorized by their respective charters, during the existing term of such charters and the investments of the capital and assets of such companies may remain the same as prescribed by their charters, anything in this act to the contrary notwithstanding, and such companies shall also be entitled to all the privileges and powers granted by said charters.

Sec. 21. It shall be the duty of the President or Vice President and Secretary of each company organized under this act, or incorporated under any law of this State, annually, on the first day of January of each year, or within one month thereafter, to prepare under their oath, and deposit in the office of the Auditor of Public Accounts, a statement of the condition of such company on the thirty-first day of December then next preceding, exhibiting the following facts and items in the following form, namely:

First, The amount of capital stock of the company actually paid in.

Second, The property or assets held by the company, specifying,

1. The value, or as nearly as may be, of the real estate held by such company;

2 The amount of cash on hand and deposited in banks to the credit of the company, specifying in what banks the same are deposited;

3. The amount of cash in the hands of agents and in course of transmission;

4. The amount of loans secured by mortgages and bonds, constituting the first lien on real estate on which there shall be less than one year's interest due or owing;

5. The amount of loans on which interest shall not have been paid within one year previous to such statement;

6. The amount due the company on which judgments have been obtained;

7. The amount of stocks of this State, of the United States, of any incorporated city of this State, and of any other stocks owned by the company, specifying the amount, number of shares, and par and market value of each kind of stock;

8. The amount of stocks held thereby as collateral security for loans, with the amount loaned on each kind of stock, its par value and the market value.

9. The amount of assessments on stock or premium notes, (paid and unpaid), specifying each;

10. The amount of interest actually due and unpaid;

11. The amount of premium notes on hand on which policies are issued.

12. The amount premium notes on hand on which policies are issued.

Third, The liabilities of such company, specifying,

1. The amount of losses due and yet unpaid;

2. The amount of claims for losses resisted by the company;

3. The amount of losses incurred during the year, including those claimed and not yet due, and including the probable

amount of those reported to the company upon which no action has been taken;

4. The amount of dividends declared and due and remaining unpaid;

5. The amount of dividends, if any, declared but not yet due;

6. The amount of money borrowed and security, if any, given for the payment thereof;

7. All other existing claims against the company, and also the gross amount of outstanding risks, and the gross amount of premiums thereon unearned.

Fourth, The income of the company during the preceding year, specifying,

1. The amount of cash premiums received;

2. The amount of notes received for premiums;

3. The amount of interest money received;

4 The amount of income received from other sources.

Fifth, The expenditures during the preceding year, specifying,

1 The amount of losses paid during the year, stating how much of the same accrued prior, and how much subsequent, to the date of the preceding statement, and the amount at which losses were estimated in such preceding statement;

2. The amount of dividends paid during the year;

3. The amount of expenses paid during the year, including commissions and fees to agents and officers of the company;

4. The amount paid in taxes, specifying the amount paid in this State.

(Gross Ill. Statutes, Vol. 1, Chap 53. a.)

That sometime in the summer of 1870, certain persons claiming to be officers and stockholders of the company took action to amend the charter so as to authorize an increase of capital to the amount of five millions of dollars.

That on the 25th day of November, 1870, the defendant purchased what was claimed to be of this increased capital stock fifty shares, and paid down twenty per cent. of the amount.

The shares were one hundred dollars each.

The subscribed capital at this time was claimed to be between one million, and one million one hundred and eighty-eight thousand dollars—being greatly in excess of the capital authorized by the original act of incorporation.

That the action taken by the said officers and stockholders was designed to amend section four of the original act, so that it would read as amended as follows: "The company shall have power to use, invest, or loan its surplus funds in or on stock, bottomry and respondentia, in mortgages, or personal securities, at such a rate as private persons may legally do by the laws of this State, *and may increase its capital to five millions of dollars.*"

Inserting this section as amended in the place of section 4 of the original act, it gave to the company an authorized capital at that time of one hundred thousand dollars, and allowed the company to increase the capital to five millions of dollars.

At the time of the sale of the stock in question to the defendant the company had taken no action to increase its capital, under the amended section 4, to five millions of dollars. It remained therefore as defined and limited by the original act of incorporation.

The defendant supposing he had purchased valid and authorized stock, acted as a stockholder in said company to this extent: He gave a proxy to *L. R. Atwater* to attend the annual meeting of the directors of the company in January, 1871. He paid in all thirty per cent. of his stock; he acted as president of the Grand Rapids branch of the Grand Rapids stockholders.

On the 6th day of February, A. D. 1872, the corporation was adjudicated a bankrupt in the District Court of the United States for the ~~West~~ South-ern District of Illinois, and plaintiff appointed assignee.

On the 5th day of July, 1872, the said District Court ordered the entire amount unpaid on the capital stock of the bankrupt corporation to be paid to the assignee.

The defendant in this suit not having paid the balance of the stock represented by the certificate held by him as aforesaid, this action was brought to enforce its collection.

The cause was originally put at issue under the plea of the general issue alone, but after the cause was at issue, the defendant for the first time ascertained that in the selling of the stock to him, a fraud had been practiced upon him, and by leave of court, he added a notice covering such defense, and upon the issue thus formed the case was tried. These fraudulent representations are substantially set out on pages 13 and 14 of the record. Those lettered (*a*) and (*i*) this court has,

since the trial of this cause in the court below, disposed of.

Under sub-division (*c*) of the notice, the defendant claimed that there were no legal and valid steps taken to amend the act of incorporation or to increase the capital stock. That the alleged proceedings to affect the increase was founded in fraud and forgery; and that upon their face they were illegal, and not in compliance with the laws of Illinois, that the persons who pretended to act as the officers and stockholders of the said corporation were not the officers and stockholders of such corporation, and had no authority to bind the corporation or increase its capital stock.

That, under sub-division *(b)*, the defendant claimed that the corporation had no valuable or valid stock to issue to him, for the reasons stated above, and for the reason also that the company had not taken any action to increase its stock above the one hundred thousand dollars authorized by its original act of incorporation.

That the proper construction of the original act limited the capital to one hundred thousand dollars, with authority to increase the same to five hundred thousand dollars; but, in either case, the capital was required to be fully subscribed before the company was authorized to do business, or at any rate to enforce collection of subscriptions to stock.

On the trial of the cause, the plaintiffs offered and read in evidence the original act of incorporation.

He then offered in evidence copies of papers on file in the office of the Auditor of Public Accounts, and in the office of the Secretary of State of the State of Illinois, duly certified by said officers.

These papers are contained in the record, and are marked respectively, A, B, C, D, E and F. They were offered by the plaintiff for the purpose of showing that the corporation had increased its capital to five million dollars. The objections to the introduction of such copies in evidence, are stated in the record, page 20. The sections of the statute under which they were sought to be introduced, are given above. Sections 10 and 18.

The certificate of *W. Bushnell*, Attorney General of Illinois, bears date July 28th, 1870. At that time of the papers, copies of which were offered in evidence, there existed the paper marked "D," being the act of incorporation, the paper "C" without date, the paper marked "B" of July 23d, 1870, and the paper marked "E" of date June 22d, 1870. The paper marked "A" was not subscribed until the 22d day of August, 1870, and was not filed until the 23d of August, 1870. There was no law requiring such a paper as "A" to be filed, and nothing can be predicated upon it to affect the question of increase of stock. The paper marked "A" is signed by *eighteen* names, and in the body of the paper they depose that they *"compose a majority of the Directors of the Great Western Insurance Company of Chicago, Illinois."* How many directors there were in the Company at this time the record does not disclose, but since eighteen compose a majority it is safe to presume that there were less than thirty-six. But section 2 of the Act of Incorporation limited the number of directors to *nine*. Section 7 above recited required the proof of publication to be made by the *affidavit* of the publisher of such newspaper, his foreman or clerk. The paper "B" only contains a *certificate* of the publishers. Section 18 above recited also re-

quires, among other papers, to be filed "a declaration under its corporate seal signed by its President and directors of their desire so to do." No such declaration is contained in the papers filed or offered. The objections of defendant were overruled, and the papers marked "A" to "F" read in evidence to the jury Testimony was offered and received against the objections of defendant "for the purpose of showing that the Great Western Insurance Company held out to the public that their capital stock subscribed, was on the 31st day of December, 1870, $1,188,000," also that they represented on their policies that they had a *proposed capital* of $5,000,000, and a *subscribed capital* of $1,000,000 on the 8th of July, 1871.

The statute of the State of Michigan, prescribing under what circumstances and conditions foreign insurance companies may transact business in the State of Michigan, among other things provides: "And shall also file a certified copy of its charter, or deed of settlement, together with a statement under oath of the president or vice-president or other chief officer and secretary of the company for which he or they may act, stating the name of the company and place where located, *the amount of its capital*," etc. (1 Compiled Laws of Michigan, paragraph 2987.)

The defendant offered in evidence certified copies of the charter and statement filed under said law, and the same were read to the jury without objection. (See pages 25 and 26 of the record.)

The defendant then offered to read in evidence certain depositions taken in the cause for the purpose of showing that the stock sold to defendant was spurious, and also for the purpose of showing that the paper documents - copies of which had been introduced in evidence by the plaintiff—relative to an increase of stock were forged, fraudulent and void, and that the persons who pretended to assent to the increase of stock had no authority so to do, and that the de-

fendant had no notice or knowledge of the falsity of the representations until after the bankruptcy of the company, nor until after the commencement of the suit, which depositions for the purpose stated were excluded by the court.

Defendant offered evidence to prove that the defendant was induced to purchase the stock, an assessment upon which is sued for in this case, by and through the representation of the Great Western Insurance Company; that the company had power and authority, by virtue of its charter and amendment, to issue valid and valuable stock, which was false; that the company had no such power and authority, and that defendant had no notice, knowledge or information touching the falsity of such representations until after the bankruptcy of said corporation, nor until after the commencement of this suit, which said evidence for the purpose aforesaid was excluded by the court.

The defendant also offered evidence to prove that the defendant was induced to purchase the stock, an assessment upon which is sued for in this case by and through the false representations of the Great Western Insurance Company, to the effect that the said company had $5,000,000 of authorized stock; also to prove that the stock of said company, as it was originally organized under its charter, was one hundred thousand dollars, and was fully subscribed and taken, and nine directors were chosen and *James H. Rees* elected president of said company, and that the holders of this one hundred thousand dollars stock in this company never increased their capital stock, nor authorized its increase; that this company ceased to do business entirely prior to 1868; that this original one hundred thousand dollars of stock in said company was not transferred to the company, who claimed to have reorganized and increased the capital stock, and that there was no valid transfer of the original stock, franchise, charter or charter rights by the Great Western Insurance Company, as it was organized in

February, 1857, at or before the time of the pretended increase of the capital made by the parties who claimed to have received this transfer; all of which evidence was excluded from the jury by the said court.

The jury, under the charge of the court, found a verdict for the plaintiff.

Assignment of Errors.

I.

The court erred in permitting the copies of the papers on file in the office of the Auditor of public accounts, and in the office of the Secretary of State of the State of Illinois, duly certified by said officers which are designated by the marks "A," "B," "C," "D," "E," and "F," to be read in evidence to the jury against the objections of defendant.

II.

The court erred in overruling the objection of defendant to the introduction of a paper writing purporting to be the third annual statement of the Great Western Insurance Company filed in the office of the auditor of public accounts, State of Illinois, showing their condition on the 31st day of December, 1870, for the purpose of showing that the Great Western Insurance Company, held out to the public that their capital stock subscribed then was $1,188,000.00, and in permitting said paper writing to be read in evidence.

III.

The court erred in overruling the objection of defendant to the introduction of what the witness *Gardner* called a stock ledger, and in allowing said stock ledger to be read in evidence to the jury.

IV.

The court erred in overruling the objection of defendant to the reading in evidence of the pamphlet to the jury for the purpose of showing the representations of tne company to the public, and to show that *Mr. Chubb* was held out as a director of the company, and a stockholder at the Grand Rapids branch of Grand Rapids stockholders.

V.

The court erred in overruling the objection of defendant to the reading in evidence to the jury, and in permitting to be read a policy of insurance of the Great Western Insurance Company, numbered 14,780, bearing date July 8th, 1871, and having printed thereon "Proposed Capital, $5,000,000," "Subscribed Capital, $1,000,000," for the purpose of showing that they represented on the policies that they issued that they had a proposed capital stock of $5,000,000.00, and an actual subscribed capital of $1,000,000.

VI.

The court erred in sustaining the objections of plaintiff to the introduction as evidence and excluding the depositions of *James H. Rees, Evart Van Buren, Charles V. Dyer, Nicholas P. Iglehart, J. McKay Sanger, Fernando Jones, John F. Eberhart, J. Seeley Wallace, Orrin L. Mann, J. M W. Jones, Robert H. Foss and Lewis Benedict,* to the effect that the stock was spurious that was sold to the defendant, and that the originals of the paper documents introduced on the part of the plaintiff in this suit relative to increasing the stock of this company were forged, fraudulent and void, and the persons who pretended to assent to the increase of said stock had no authority to do so, and that the defendant had no notice or knowledge of the fraudulent character of said papers until after the bankruptcy of the company and after suit brought.

VII.

The court erred in sustaining the objection and excluding the testimony offered by defendant, that the defendant was induced to purchase the stock, an assessment upon which is sued for in this case, by and through the following representations of the Great Western Insurance Company, namely: That the corporation had power and authority by virtue of its charter and amendments, to issue valid and

valuable stock, and that such representations were false, and that they had no such power, and that defendant had no notice, knowledge or information touching the falsity of such representations until after the bankruptcy of said corporation, nor until after the commencement of this suit.

VIII.

The court erred in sustaining the objection of plaintiff, and excluding the testimony offered by the defendant, that the defendant was induced to purchase the stock, an assessment upon which is sued for in this case, by and through the following representations of the Great Western Insurance Company, namely: That the said Company had five millions of dollars of authorized stock, and that the said representation was false, and that defendant had no knowledge or notice of the falsity of such representation until after the bankruptcy of said Company, nor until after the commencement of this suit.

IX.

The court erred in sustaining the objection of plaintiff, and excluding the testimony offered by defendant, to prove that the defendant was induced to purchase the stock, an assessment upon which is sued for in this case, by and through the following representations of the Great Western Insurance Company, namely: That the Company had a subscribed capital of one million dollars, and that *James .H Rees, J. M W. Jones, Fernando Jones, J. Seeley Wallace* and *Philip Wadsworth*, were stockholders in said Company; that the management was in the hands of the best men in Chicago, such as *J. McKay Sanger, Philip Wadsworth, J. Seely Wallace* and *J. M. W. Jones;* that said individuals were known to said defendant, some personally, and some by reputation, and relying upon the truth of said statements, defendant purchased the stock, the assessment upon which is in suit; that all of said representations were false that none of the parties named were stockholders or direct-

ors of said company, and that defendant had no notice or knowledge of the falsity of said representations until after the bankruptcy of the company, nor until after the commencement of this suit.

X.

The court erred in sustaining the objection of plaintiff, and excluding the testimony contained in the depositions of *James H Rees, Evart Van Buren, Charles V. Dyer, Nicholas P. Iglehart, Fernando Jones, John F. Eberhart, J. McKay Sanger, J. Seeley Wallace, Orin L. Mann, J. M. W. Jones, Robert H. Foss* and *Lewis Benedict*, to the effect that the stock of the Great Western Insurance Company, as it was originally organized under its charter, was one hundred thousand dollars, and was fully subscribed and taken, and nine directors were chosen, and *James H. Rees* elected President of said Company, and that the holders of this one hundred thousand dollars stock in this company never increased their capital stock, nor authorized its increase; that this company ceased to do business entirely prior to 1868; that this original one hundred thousand dollars of stock in said company was not transferred to the company who claimed to re-organize and increase the capital stock of said company, or to any individual or individuals who claim to have reorganized and increased the capital stock, and that there was no transfer of the original stock, franchise, charter, or charter rights by the Great Western Insurance Company, as it was organized in 1857, at or before the time of the pretended increase of the capital stock.

(Record, page 30.)

XI.

The court erred in instructing the jury that the certified copies of papers, certified by the proper public officers under the seal of the State, which had been introduced with a view

of showing the steps taken to increase the stock of the Great Western Insurance Company of Chicago up to five millions of dollars, and for the purpose of showing also that a million or more dollars had been subscribed was conclusive as to the facts recited in those documents.

The charge of the court upon the subject of this exception *totidem verbis* is as follows:

"The bankrupt corporation represented by the plaintiff was chartered by the Legislature of the State of Illinois in 1857, and went into operation, I think, in 1859. The Legislature of that State in 1869 authorized an increase of the capital stock of all existing fire insurance corporations upon certain proceedings to be taken for that purpose. For the purpose of showing compliance with the provisions of the statute, certain copies of papers certified by the proper public officers, under the seal of the State, have been introduced with a view of showing the steps taken to increase the stock of the Great Western Insurance Company of Chicago up to five millions of dollars, and for the purpose of showing that a million or more dollars had been subscribed. This evidence I instruct you is conclusive as to the facts recited in these documents.

(Record page 31.)

XII.

The court erred in instructing the jury that if they found that the company issued policies of insurance from July 1870 up to the time of the great fire in October, 1871, in Chicago, and that it did business as an insurance company during that time, and held itself out to the public as an incorporated company, authorized to transact the business of insurance, that it issued pamphlet circulars representing its proposed capital and actually subscribed capital, and amount paid in on the stock subscribed, that then the Great Western Insurance Company was a corporation authorized to do an insurance business, and its acts and doings so far as regards its stockholders, would be binding upon them *for all the purposes of this action.*

(Record page 32.)

The charge of the court upon the subject of this exception is as follows:

"There is evidence in this case tending to show that the company issued policies of insurance from July 1870 up to the time of the great fire in October 1871, in Chicago, and that it did business as an insurance company during that time, and held itself out to the public as an incorporated company, authorized to transact the business of insurance, that it issued pamphlet circulars representing its proposed capital and actually subscribed capital, and the amount paid in upon the stock subscribed. If you find such to be the facts, then I instruct you the Great Western Insurance Company was a corporation authorized to do an insurance business, and its acts and doings so far as regards its stockholders would be binding upon them for all the purposes of this action."

(Record page 31.)

XIII.

The court erred in instructing the jury as follows: "Now if you find as facts what I have referred to as evidence in the case taken in connection with the admissions, the defendant is estopped to deny his liability as a stockholder to the extent of any stock which he may have been shown or admitted to hold in this company.

(Record page 33.)

The charge of the court so far as relates to this exception *totidem verbis*, is as follows:

"The bankrupt corporation represented by the plaintiff was chartered by the Legislature of the State of Illinois, in 1857, and went into operation, I think, in 1859.

The Legislature of that State, in 1869, authorized an increase of the capital stock of all existing fire insurance corporations, upon certain proceedings to be taken for that purpose. For the purpose of showing compliance with the provisions of the statute, certain copies of papers certified by the proper public officers, under seal of the State, have been introduced with a view of showing the steps taken to increase the stock of the Great Western Insurance Company of Chicago up to five millions of dollars, and for the purpose of showing also that a million or more dollars had been subscribed. This evidence, I instruct you, is conclusive as to the facts recited in these documents. There is evidence in this case tending to show that the company issued policies

of insurance from July, 1870, up to the time of the great fire in October, 1871, in Chicago, and that it did business as an insurance company during that time, and held itself out to the public as an incorporated company authorized to transact the business of insurance; that it issued pamphlet circulars representing its proposed capital, and actually subscribed capital and the amount paid in upon the stock subscribed. If you find such to be the facts, then, I instruct you, the Great Western Insurance Company was a corporation authorized to do an insurance business, and its acts and doings, so far as regards its stockholders, would be binding upon them for all the purposes of this action.

There is evidence tending to show, and, indeed, it is admitted that defendant became the holder of stock, November 25, 1870, of five thousand dollars of the increased capital stock of this company; and there is some evidence tending to show that he held an additional thousand dollars, but there is no admission to that fact. I do not say there is evidence to show it, but I say there is some evidence tending to show that he had an additional thousand dollars. It will be for the jury to determine whether he was, in fact, the holder of five thousand dollars, or any less or greater amount of the capital stock of that company. It is admitted that defendant paid thirty per cent. upon the stock which he held, all but six hundred dollars of which were paid before the bankruptcy of the corporation, and that sum after its bankruptcy. That defendant was president of the Grand Rapids branch of the stockholders; that he gave a proxy to *Atwater* to attend the annual stockholders' meeting of the company at Chicago, in January, 1871, and also that he attended a directors' meeting of the company in January, 1872, and participated in the business of that meeting. Upon this testimony, so far as it is not admitted, outside of the documentary evidence certified from the State department of Illinois, the facts are for the jury to find. So far as the facts are admitted, of course, that concludes both parties."

XIV.

The court erred in instructing the jury as follows: "And regarding the documentary evidence certified from the State Department of Illinois as matters which the jury cannot find against because they are conclusive."

(Record page 33.)

The charge of the court relating to the exception taken is in the following words:

"I think I ought to add in justice to the defendant as well as to the plaintiff, that under such a state of facts, with such admissions as are made in this case, there is very little else for the jury to do than determine the amount of stock which *Mr. Chubb* held in that corporation, less what he has paid, and render verdict for the plaintiff for the balance.

Having excluded a large portion of the testimony offered by the defence it leads to the practical result. At the same time I do not take the case out of the hands of the jury so far as any facts are submitted to them, and the facts are all submitted for the jury to pass upon. Regarding the admissions, however, as matters that the jury cannot find against, and regarding the documentary evidence certified from the State Department of Illinois, as matters which the jury cannot find against because they are conclusive."

Points of Law and Fact.

I.

THE BANKRUPT CORPORATION REPRESENTED BY PLAINTIFF WAS INCORPORATED UNDER A SPECIAL CHARTER. BY THEIR CHARTER (SEE RECORD PAGES 25 AND 26) THE CAPITAL STOCK WAS LIMITED TO $100,000, WITH LIBERTY TO INCREASE TO $500,000.00.

THE CAPITAL CANNOT BE INCREASED EXCEPT IN THE MANNER EXPRESSLY AUTHORIZED BY THE CHARTER OR STATUTE OF THE STATE.

Railway Company vs. Allerton 18 Wal. 233.

The declaration alleges (page 3 of record) that the Great Western Insurance Company is a corporation created and existing under and in pursuance of an act of the Legislature of the State of Illinois, entitled "An act to incorporate the Great Western Insurance Company of Chicago, Illinois," approved February 4th, 1857. As the plaintiff and defendant both introduced this act in evidence this fact may be considered at rest. It was then a corporation with a capital of $100,000, with a right granted to the corporation to increase it to $500,000. The number of directors were limited to nine.

The corporators had such rights and privileges as were secured to them by this act, and no other, except as the act of 1869 may have qualified the original act of incorporation. And here it may be remarked that this action is not based upon the stock that was authorized to the amount of $100,000, or even $500,000 by the said act. The declaration, therefore, further alleges, on page 3, that on the 25th day of June, A. D 1870, "under and in pursuance of the provision of the laws of the State of Illinois the charter of said company was by

the stockholders and directors thereof amended, so that its capital stock might be increased to five millions of dollars;" and the declaration further alleges, on page 6 (folio 15), that the said capital stock is of a large amount, to wit, of one million dollars and upwards. To establish these allegations of the declaration, the plaintiff offered the certified copy of certain papers in evidence (record, page 16) which were objected to, and out of this ruling of the court on these objections arises the first assignment of error.

In order to show that the corporation had obtained authority to increase their capital stock to five million dollars, under the Illinois statute of 1869 above cited, the following steps were necessary :

1st. The company must publish notice of such intention to increase the amount of its capital stock once a week for four weeks in a newspaper published in Cook county.

(Section 18, above cited.)

The object of this is to apprise the stockholders and all others interested of the proposed increase of the capital stock.

2d. The written consent to such increase of three-fourths in amount of its stockholders must be obtained.

(Section 18, Ibid.)

The method of obtaining such consent manifestly must be by a meeting of the stockholders, duly assembled for the purpose of considering the proposition.

The language of the statute does not in terms point out that the action must be had at a meeting of the stockholders, yet a change so radical in the fundamental law of the corporation as to authorize an increase of capital from $500,000 to $5,000,000 could, we insist, be made only at a meeting of the corporators—the statute requiring the written assent is an additional safeguard and designed to prevent any fraudulent act or vote of a minority of the stockholders, and to perpetuate the evidence of the fact.

3d. The charter with respect to the amount of capital stock must be altered and amended (Sec. 18.)

In the case under consideration the charter or section of the charter as altered and amended is set out in record page 19, in paper marked "E."

It will be observed here that whatever effect may be ascribed to the proceedings taken by this company as disclosed by the proof, they only amended their charter so as to authorize the corporation to increase its capital to five million dollars. They did not attempt nor purport to increase their capital by those proceedings absolutely to five million dollars. We shall call attention to this further on.

4. The following papers must be filed in the office of the Auditor of Public Accounts.

a. A copy of such amended charter.

b. A declaration under the corporate seal signed by its President and directors of their desire so to do.

c. The written consent of three-fourths in amount of its stockholders to such increase.

d. Proof by affidavit of the publisher of the newspaper, his foreman or clerk (Sec. 7) of the publication of the notice of intention.

5. The examination and proof of publication must be made by the Attorney General, and if found to conform to the act of 1869, and not inconsistent with the constitution and laws of the State, he must certify the papers to the Auditor of Public Accounts. (Sec. 10.)

6th. The Auditor of Public Accounts then examines, or causes an examination to be made, who shall certify under oath that the capital required by the act of 1869 of the company has been paid in, and is possessed by them in money, or in such stocks, bonds and mortgages as are required by section 8 of the act. *And the corporators and officers of the*

company shall be required to certify under oath that the capital exhibited to those persons is *bona fide* property of the company.

Such certificates shall be filed in the office of said auditor, who shall thereupon deliver to such company a certified copy of the charter and of said certificates, which, on being filed in the office of the clerk of the county where the company is to be located, shall be their authority to commence business and issue policies.

By comparing these requirements of the statute with the papers offered in evidence it will be seen at a glance how far short of the requirements of the law they were.

In this connection it may be well to consider the fact that this act of the company was not in any sense an attempt to organize under the act of 1869, nor was a reorganization under that act made. They already had a charter and an organization. The principles of law relating to the organization or attempted organization of corporations under a general law, where they have failed to comply with all the requirements but yet have acted as a corporation, cannot be invoked in aid of this attempt to increase the capital stock. This company does not get its right to act as a corporation from the general law, but from its act of incorporation. Its incorporation is not questioned. Its increase of capital stock to five million dollars is one of the important questions in this case, and the burthen was upon the plaintiff to prove such increase. The paper marked A, page 16 of record, is not required to be filed by any law; it forms no part of the requirements to increase the capital. It was filed August 23, 1870, after the papers were filed upon which they predicate their right to increase the capital. There are *eighteen* names appended to the paper, and they swear that they constitute a *majority* of the directors Not being required or authorized by any law to be filed, and no proof being offered of the genuineness of the original, or

how or by whom it was placed on file, so as to connect it in any manner with the company or its officers or agents. It was wholly immaterial to the issue. It was not competent proof of any facts contained in it. Yet it was not only admitted in evidence, but the court in charging the jury refers to this paper as evidence in the case in the following language: "For the purpose of showing compliance with the provisions of the statute certain copies of papers, certified by the proper public officers, under the seal of the State, have been introduced with a view of showing the steps taken to increase the stock of the Great Western Insurance Company of Chicago up to five millions of dollars, *and for the purpose of showing also that a million or more dollars had been subscribed.* This evidence, I instruct you, is conclusive as to the facts recited in these documents."

The paper B, page 17 of record, was inadmissible for the reason that the proof of publication is required by section 7 to be by the affidavit of the publisher. Here, therefore, there was absolutely no proof of the publication of notice of intention.

The law (Sec. 8,) required the notice to be published once a week, for four weeks The certificate of the publishers does not certify with any degree of certainty as to that fact. The language is vague and open to a different construction from that required by the statute, but as it is not the required evidence we pass it, and call attention to the paper "C." This purports to be the written assent of three-fourths of the stockholders to the increase. While this paper might be proper evidence as a step in the proceeding, if preceded or followed by other evidence, showing that the persons signing the same were stockholders in the original company, and constituted three-fourths thereof in amount, and that the meeting of stockholders had decided to increase the stock. Yet this was not done in this instance, on the contrary, the court held that no other proof was necessary,

that the paper was conclusive and could not even be gainsayed, for the reason that it had been filed in the office of Auditor of Public Accounts, and the copy of the paper had a certificate of the Secretary of State of the State of Illinois, under the Seal of State attached, showing that the paper was a copy of one on file in his office, and he charged the jury that "this evidence is conclusive as to the facts recited in these documents"

It was then in the view of the judge conclusive that the "undersigned" were stockholders in the Great Western Insurance Company, and that they consented and desired the capital stock of said company should be increased to five million dollars, but that is all. There is still nothing to show how much stock these persons held or whether or not they held three-fourths in amount of the stock of the company.

The statute (Sec. 18,) required that the copy of the charter so amended, together with a declaration under its corporate seal, signed by its President and Directors of their desire to do so, that is, to increase the capital stock, with such written consent, should be filed. The papers offered contained no declaration signed by the President and Directors under its corporate seal - no such paper was filed. There was nothing filed which the statute required to show that the amendment was the corporate act.

The paper "F," pages 19 and 20, cannot cure these defects, aside from the certificate being palpably erroneous in its statement, the very papers themselves impeach the certificate, and render it utterly nugatory and worthless. The law, however, only required of the Attorney General to certify that the *charter and proof of publication* was conformable to the act of 1869, but did not require that officer to certify as to whether section 18 of the act had been complied with, hence if such certificate were conclusive it would not

do away with the necessity of proving the other steps required by section 18 to be taken.

Johnson vs. *Hocker*, 1 Dal. 406.

But the proof made by the papers when admitted in evidence did not show that the company had really increased the capital beyond the $100,000 authorized by the act of incorporation. The amendments made or attempted to be made was to section 4 of the original act, and as claimed to be amended and filed is found on page 19 of the record. (Paper marked "E.")

This amendment merely authorized the company to increase its capital to five millions of dollars, and left the capital fixed as it originally stood at $100,000. No evidence was introduced to show that the company had increased the capital beyond the $100,000, or had taken any steps to do so. Indeed the inference is quite strong from the proof introduced by the plaintiff that the company did not increase its capital. The attention of the court is called to page 24 of the record, where the plaintiff introduces evidence to show that on the 8th day of July, 1871, the company represented that they had a *proposed capital* of $5,000,000, and a subscribed capital of $1,000,000, and again upon certificate of stock purchased by defendant Nov. 25th, 1870, the capital stock is stated to be $500,000, *with liberty to increase to* $5,000,000; and also it is stated that the company was organized July 20th, 1857, under act of the Legislature approved March 4, 1857. So that the most that can be claimed for the papers offered from "A" to "F" inclusive is, that the company obtained a right to increase its capital to $5,000,000.

To set the matter at rest the defendants offered to prove that the stock sold to plaintiff was spurious, that the originals of the paper documents introduced on the part of the plaintiff, relative to the increase of stock of the company were

forged fraudulent and void, and that the persons who pretended to assent to the increase of the stock had no authority so to do; that the stock of the company as originally organized under its charter was one hundred thousand dollars, and was fully subscribed and taken; that nine directors were chosen, and *James H. Rees* was elected President of said company, and that the holders of this one hundred thousand dollars of stock never increased its capital or authorized its increase.

All of which the court excluded upon two grounds.

1st. Because the copies of papers certified under the seal of State were conclusive evidence as to the facts recited in those documents.

2d. Because the defendant was estopped to deny that the company had $ 5,000,000 capital stock, and to deny that he was a holder of stock to the amount of the certificate which he admitted to hold.

The second of these reasons I shall consider further on.

The first states the rule of law too broadly.

There were two kinds of documents certified, and by different officers.

The act of incorporation on file in the office of the Secretary of State, being the paper marked D, certified by *Ozias M. Hatch*, Secretary of State, under the great seal of State, and the other papers filed in the office of Auditor of Public Accounts, and duly certified by him.

Certified copies of public papers or documents, on file in a public office, duly certified to by the proper custodian, is admissible evidence, and are to be taken as *prima facie*, correct.

1 *Wharton* on Ev., Sec. 108.
1 *Greenl* on Ev., Sec 491.

There are instances when they are conclusive, but the case at bar I submit is not one of them. They can only be conclusive when the original record or document would itself be conclusive. To hold otherwise would be to invest the copy with greater effect as testimony than the original. It may be of equal weight, but it cannot be of superior.

Can it be doubted, if the original documents had been put in evidence from the office of the Auditor of Public Accounts, that we would have been permitted to show that they were base fabrications and forgeries?

If it was material for plaintiff to aver and prove that the company had increased its capital stock, and had sold to defendant fifty shares of such increased stock, was it not competent for defendant to controvert those facts? This was what the defendant offered to do, and this was what the court ruled he could not do, because the certified copies of the documents were conclusive upon him, and precluded him from making such proof.

Affirmative averment of plaintiff was that the company had increased its capital stock, and defendant had subscribed for, and taken fifty shares of this increased capital.

Defendant admitted purchasing the fifty shares of what was represented as increased capital, but denied that the stock had been increased and asserted that he got nothing by his purchase.

This action was brought to recover for the balance unpaid on fifty shares of the alleged increased stock. The stock was sold to defendant Nov. 25, 1870. By the paper "A" pages 16 and 17 of record, the plaintiff attempted to show that the *subscribed capital* on the 22d day of August was one million dollars. This exceeded not only the limit of $100,000 but the limit of $500,000, and consequently if defendant became a subscriber in November following, his stock must be of the alleged increase.

Indeed the suit was tried upon the theory that defendant's stock was of the alleged increased capital. (See judge's charge, page 31, fo. 81.)

II.

IN AN ACTION TO RECOVER FROM DEFENDANT UPON A SUBSCRIPTION TO, OR SALE OF SUCH INCREASED STOCK, IT IS INCUMBENT ON THE PLAINTIFF TO SHOW THAT THE STOCK WAS INCREASED BY COMPETENT AUTHORITY; THAT IT IS VALID, AND CONFERS UPON HIM THE RIGHTS OF A STOCKHOLDER.

McCord vs. *Ohio & Miss. R. R. Co.* 13 Ind. 222.

Mechanics' Bank vs. *N. Y. & N. H. R. R. Co.*, 13 N. Y. 620,

Holbrook vs. *Faquier*, &c., 3 Cranch C. C. R. 425.

New York & N. H. R R Co vs *Schuyler* 34 N Y 49,

Head & Armory vs *Providence Insurance* Co, 2 Cranch 128 166.

Mutual Life Insurance Co, vs *McKelway*, 12 N J Ch 133.

Railway Company vs *Allerton*, 18 Wal 233.

The case of *McCord* vs. *Ohio & Mississippi Railway Company* cited above, was an action to recover a stock subscription. The answer was that the capital was limited by charter to $5,000,000, unless a further increase was necessary, etc , by the president and directors, etc., and that an unauthorized increase had been made of $1,500,000. On the trial no evidence was offered that the president and directors had increased their capital stock beyond the $5,000,000 provided for in the charter, as was alleged in the answer. The trial court charged the jury "that it is immaterial, for the jury to enquire as to whether the capital stock of the company was increased or not." The Supreme Court on review say: "It is claimed by the counsel for the appellees that the issue formed upon this paragraph of the answer was wholly immaterial and, therefore, that the change was correct. We do not coincide in this view of the

pleading. If, as alleged in the answer, the company had already issued stock to the full amount of $5,000,000 provided for in the charter, they had none left to vest in the defendant upon his payment of the subscription, unless the amount of the stock had been increased by the president and directors of the company. Without such increase certificates of stock issued by the officers of the company would be unauthorized and void *Pierce Railroad Law*, 130 *et Seq.* Now we take it to be clear that although the tender of a certificate of stock to a subscriber is not necessary before suit on the subscription, yet no recovery can be had unless the company is in a condition that a subscriber for stock upon the payment of his subscription may receive his stock and become entitled to the rights of a stockholder. How can that be the case when the entire amount of stock authorized by the charter has been taken and issued to other subscribers? Suppose in the present case the charter had absolutely limited the stock to the amount of $500,000, instead of permitting the President and Directors to increase it. It would probably not be contended that after the whole amount had been taken and issued, a person having subscribed but not having paid or received any stock could be compelled to pay his subscription. He could not be compelled to pay unless the Company could furnish him with that for which he subscribed, which in the case supposed they could not do for the reason that the entire authorized capital has been taken and issued to more prompt subscribers. If the company has not increased their stock through the action of their President and Directors, they stand so far as the appellant is concerned, as if their stock was absolutely limited to the $5,000,000 already issued. The appellant should not be compelled to pay his subscription, trusting to the President and Directors to increase their stock that he may have the benefit of it. * * * * The whole amount of the capital stock provided by the charter having been taken and issued, we think an increase of the stock as provided in the

charter, a *condition precedent* to the right of collecting further subscriptions."

I have quoted thus liberally from the opinion of the court, in the case cited, for the reason that it is a case in point, and if sound in principle, sustains the position assumed by the defendant.

If in the case under consideration the charter was not amended so as to authorize an increase of capital to $5,000,000, or, if it was amended and the company never, in fact, increased the capital beyond that limited by the original charter, then, in either event, the company did not have the stock to sell to defendant, and that which was sold was unauthorized and spurious. By purchasing it he did not become a member of the corporation and entitled to participate in its rights, franchises and privileges. Any of the original stockholders who held the valid and authorized stock could have objected. Neither the president or directors could by any act of theirs force him into the corporation nor deprive any of the holders of the valid and authorized stock of their just share in the control or profits of the corporation; for to the extent that the stock is issued in excess of the amount limited by the charter, to that extent does it trench upon and injuriously affect the rights of the holders of the original stock. It is for these and kindred reasons that stock issued in excess of the amount of capital limited by law cannot be held to entitle the holder to the privileges of membership in the corporation.

Perhaps it may be possible to conceive of a state of facts whereby each stockholder would be estopped to deny that a holder of stock issued in excess of the legal limit was entitled to all the rights of membership; such as if all the stockholders knew that such stock was issued, and ratified the act. But such act of ratification would need to be clearly proved. If it were claimed that the stockholder was held out to the public by the officers of the company as a stock-

holder or director, or that he was listed as a stockholder on the books, or that he acted as a stockholder or director, it would have to be proved that knowledge of such acts and representations had been brought home to such original stockholder, and that with such knowledge he had acknowledged or admitted his right to membership.

This ratification or estoppel must be the individual act of the stockholder. A majority of the stockholders cannot affect the rights of a minority, however small, by recognition or estoppel, because that would permit them to do indirectly what they could not do directly, namely, to increase the capital stock, otherwise than in the manner provided by law.

Now in this case no evidence was introduced showing or tending to show that the holders of the original stock had any knowledge of the increased stock, or that defendant held the same or any part thereof. It was not shown who they were or where they resided. No proof of recognition by the stockholders of this original stock was attempted to be made of any right of defendant to membership in the corporation No proof of any acts or representations were brought home to the knowledge of such stockholders from which an estoppel could be inferred.

The defendant bought this stock Nov. 25th, 1870, and in less than one year the great fire occurred, which ended the business of this company. Within this short space of time it is not shown that there was any meeting of the stockholders of this corporation.

How can it be presumed that every stockholder of the original stock had knowledge of the wrongful sale of stock to defendant by those assuming to manage the company?

It seems to me that the reasoning of the court in the case of the *Railway Company* vs. *Allerton*, above cited, supports the point last made, and that the company must have stock which it can sell, before it can enforce payment for stock it did not

own and had no authority to sell. If courts will enjoin the issuing of such stock because it is unauthorized, so will they refuse to enforce collection of payment of stock so issued as between the company and subscriber to such unauthorized stock.

III.

NO ACTION CAN BE MAINTAINED BY THE COMPANY FOR A SUBSCRIPTION TO ITS CAPITAL STOCK, UNTIL THE WHOLE AMOUNT AUTHORIZED HAS BEEN SUBSCRIBED.

Fry vs. *Lexington and Big Sandy R. R. Co.* 2 Metc Ky., 314
Shurtz vs. *Schoolcraft R. R. Co*, 9 Mich., 269.
Oldtown Railroad Co., vs *Veazie*, 39 Maine, 571.
Central Turnpike Corporation vs *Valentine*, 10 Pick. 142.

If it be true as claimed by plaintiff, that the capital stock was increased to $5,000,000, then the whole amount must be subscribed before subriptions can be enforced.

Sec. 7. (See page 3 of this brief,) provides that upon certain acts being done, the company may "open books for subscription to the capital stock of the company so intended to be organized, and to keep the same open until the full amount specified in the charter is subscribed." Sec. 19. (See *ante* page 4.) brings the company under the provision of sec. 7. Section 4 of the same act reads as follows:

Sec. 4. The charter comprised in such declaration shall set forth the name of the company, the place where the principal office for the transaction of its business shall be located, the mode and manner in which the corporate powers granted by this act are to be exercised, the mode and manner of electing trustees or directors, a majority of whom shall be citizens of this State, and of filling vacancies (but each director of a stock company shall be the owner, in his own right, of at least five hundred dollars worth of the stock of such company, at its par value), the period for the commencement and termination of its fiscal year, and the amount of capital to be employed in the transaction of its business. * * *

Under the above provisions of law the subscriptions to

the full amount of the capital at any time limited and fixed is a condition precedent to the enforcement of collection of subscriptions.

But plaintiff claims that there was no error in the rulings of the court, which form the basis of the 6th, 7th, 8th 9th, 10th, 12th and 13th assignment of errors, for the reason that defendant is estopped by his acts to deny that he was a stockholder or his liability to pay the balance due on the purchase of such stock.

IV.

THE RECORD DOES NOT SHOW THAT THE DEFENDANT IS ESTOPPED FROM DENYING HIS LIABILITY TO THE PLAINTIFF IN THIS ACTION, AND HE OUGHT TO HAVE BEEN ALLOWED TO INTRODUCE THE PROOF OFFERED BY HIM IN HIS DEFENSE.

If an estoppel exist in this case it is not an estoppel by deed or by record, but belongs to that class called estoppels *in pais*. Here there is no dispute concerning the existence of the corporation, but the sole question is whether the act or representation has generated an estoppel. and it therefore depends upon the ordinary principles of estoppel.

What are these? They are found epitomized in Bigelow on Estoppel, page 437, as follows:

1. There must have been a representation or concealment of *material* facts.

2. The representation must have been made with *knowledge* of the facts.

3. The party to whom it was made must have been *ignorant of the truth* of the matter

4. It must have been made with the *intention* that the other party should act upon it.

5. The other party must have been *induced to act upon it.*

(See cases cited by Mr. Bigelow in note 3 on page 437.)

The plaintiff in his declaration seems to have recognized to a certain extent the force of the above principles and the application thereof to this case On page 7 of the record the pleader states (fo. 17,) 'And the said plaintiff avers that the said insurance company at and before the issuing of its said policies, did publish, advertise and hold out to the public and to said policy-holders that the large amount subscribed of its capital stock, to wit: upward of one million dollars as aforesaid, including the amount subscribed by said defendant, was a part of its assets and resources wherewith to pay losses, meet its liabilities and protect its creditors, and *did procure its risks*, the losses upon which are now due and unpaid, which losses now render said company insolvent *upon such advertisements and representations.*"

Was this general assertion supported by the proofs in the case? Returned in the bill of exceptions is all the testimony bearing on this question of estoppel. The record of the bill of exceptions, page 30, folio 79, states as follows:

"And on the trial of the cause aforesaid, before said jury as aforesaid, the evidence set forth and contained in the foregoing bill of exceptions is all the evidence that was introduced in said cause tending to prove that defendant was a subscriber, or had ever subscribed to or for any of the capital stock of said Great Western Insurance Company, and said bill of exceptions contains all the evidence introduced before said jury on said trial tending to prove that any creditor who had proved his claim in bankruptcy as a creditor of the Great Western Insurance Company became a creditor of the Great Western Insurance Company on the strength of defendant's having stock in said company, or of his name having appeared among the stockholders of said company, or of his having attended a meeting of directors of said company or of his having given a proxy to *L. R. Atwater* to attend a meeting of the stockholders or directors, or of his having paid thirty per cent on the stock held by him, or on account of

his being or having been the President of the Grand Rapids branch of the Grand Rapids stockholders; or on account of said company representing in the pamphlets and policies which they issued that they had an authorized capital of $5,000,000.00, and a subscribed capital of $1,188,000.00, or a proposed capital of $5,000,000.00 and a subscribed capital of $1,000,000.00

So that all the evidence going to establish an estoppel consists of the following facts:

1. The third annual statement filed in the office of Public Accounts in the State of Illinois, showing the condition of the company December 31, 1870, containing a statement that the amount of capital stock of the company then outstanding was $1,188,000; that the amount of unpaid subscribed capital, for which the subscribers or holders were liable was $965,169, and that the amount of capital stock paid up was $222,831. (Record, page 21.)

2. A small pamphlet, purporting to have been printed in 1871, containing a statement of capital stock as $5,000,000, subscribed capital $1,188,000, cash capital $222,831, names of officers, list of directors and stockholders, issued by the the company for general distribution. (Record, page 23.)

3. A policy of insurance, purporting to be a policy of insurance of the Great Western Insurance Company, and numbered 14780, bearing date July 8, 1871, and having printed thereon, "Proposed capital $5,000,000.00; subscribed capital $1,000,000.00," and issued by them. (Record, page 24.)

4. That the company had a branch at Grand Rapids, and that the branch held meetings of stockholders, in which the defendant participated; that he was president of the Grand Rapids branch, and took part in a meeting of stockholders and directors of the company in Chicago, in January, 1872; that he held a certificate of stock for fifty shares, and that it

was for the increased stock; that he became the holder of such stock November 25, 1870, and while he so held the stock he signed a proxy to *L. R. Atwater* to attend and vote at a stockholders' meeting in Chicago; that he remitted money to apply on his stock February 5, 1872. (Record, page 25.)

The above are all the facts contained in the bill of exceptions by reason of which he is claimed to be estopped.

How far short they come of making a case for estoppel, is patent at a glance. He is not shown ever to have received any dividend or benefit of any kind flowing out of his relation of stockholder. His attending the meeting in January, 1872, and his remitting money in February of the same year, was long after the fire, and after the company had ceased to do business. How these acts can be construed into evidence of an estoppel I fail to perceive. Did any person relying on these acts insure or become a creditor of the company? Did any one change their condition for the worse, or to their injury?

These two acts certainly must be eliminated from the facts which go to make the estoppel.

Take fact numbered one, above. I have before called attention to the statute found on pages 4, 5 and 6 of this brief, to show that the law did not require the statement, either as to the $1,188,000, or that of $965,169, neither the outstanding capital or the subscribed capital, but simply the amount of capital stock of the company actually paid in.

Even if those dealing with the company had a right to rely upon such statement as true, there is no evidence whatever that any person did so rely. If they did, it was a matter easy of proof. It will not do to say that because the company held out *to the public* that it possessed certain capital or had certain resources that, therefore, the defendant is liable. This company did not insure *the public*; it insured

individuals. The public does not stand to-day a creditor of this company; individuals do. It seems to me that to say that certain representations were made to the public, therefore, proof that any individual is injured thereby is dispensed with, would be carrying the doctrine of equitable estoppel to a greater length than any court has yet seen fit to declare.

To show that representations have been made, whether true or false, is only one step in the proof, and avails nothing, unless some person ignorant of the truth of the matter has been induced to act upon them.

Neither would it have been sufficient to have brought knowledge of the facts stated in the above recited numbers one, two and three, home to some person who insured in the company; he must have insured in the company, being induced thereto by the facts recited. What matters it to prove that the company made representations and that individuals insured. There is no necessary connection between these facts. They might have insured without having seen or heard of these representations. It requires proof to connect these facts, and no proof was given in this case. The burden of proof was upon the plaintiff in this case, as in all others of the same nature, where a party seeks to shut out evidence which is *prima facie* admissible, or exclude a defence valid under the ordinary rules of law.

In *Wheelton vs Hardisty* 8, *Ellis & Blackburn* 232, which was a case where an equitable defense by plaintiff by replication was interposed in an action at law that the defendants who were directors of an insurance company, had published to the plaintiffs and others a prospectus by which they represented and undertook to and with the persons who should effect insurance with them, and amongst others to and with the plaintiffs, that all insurances with them "should be unquestionable except when fraud might be practiced in obtaining them," that the plaintiffs "were induced by the defend-

ants to effect and effected the policy in the declaration mentioned," in consequence of and upon the faith of said statement, representations and undertaking." In support of this replication plaintiffs introduced the prospectus of defendants which they circulated before and at the time when the policy in question was effected; but they offered no direct evidence that the plaintiffs have been cognizant of the prospectus, or had been induced by it to effect the policy, *Mr. Justice Earle* on page 262 (263) delivering the opinion of the court says: "It seems to us that there was no such proof in this case as would justify a jury in finding the issue in question for the plaintiffs. The evidence of the existence of the prospectus was quite as consistent with the plaintiffs not knowing of it, or not being induced to act upon it as of their knowing and acting upon it. The plaintiffs may very well have effected the written contract without any reference to the prospectus; and modern cases have established that when the party on whom the onus lies of proving an allegation gives evidence as consistent with one view of the case as the other, he fails in his proof."

So in the case of the *Mutual Life Insurance Company* vs. *McKelway* 12 N. J. Ch (1 Beasl) 133, a bill was filed by the directors to enforce an assessment made by the court on the guaranty capital of the company. To increase their credit the directors created what was called the "Guaranty Capital" of $150,000," by several of the stockholders executing bonds and mortgages to the company, out of which, after other resources were exhausted, the company were to pay *pro rata*. *McKelway* gave his bond and mortgage for $2,000; he received six per cent interest. The company became insolvent and the court directed an assessment to be made on this "Guaranty Capital," and a bill was filed against *McKelway* to enforce this assessment.

The court held the contract was one beyond the powers of the corporation to make, and could not be enforced at law

or in equity. But it was urged that complainants were mere trustees acting now under the authority of the court, and that these proceedings are for the benefit of third persons who are innocent parties; that these innocent parties have been induced to insure in the company by reason of the fictitious credit which the company acquired by means of this capital, and that the defendant as one of the wrongdoers is estopped from setting up his own fraud against enforcing this mortgage for the benefit of a party who has been injured by his wrongful act. But the principle invoked has no application to the case.

1st. Because the persons who are losers are corporators, and insured under the provisions of the charter. They had no right to look for anything for remuneration, but to the fund which the charter provides.

2d. It does not appear that they are innocent parties; there is no such issue made by the pleadings as that they have been drawn in to becoming corporators by this fraud of the directors and the contributors to this fraud For anything that appears to the contrary before the court, the corporators who have met with losses were corporators prior to this arrangement in reference to the guaranty capital. It does not appear that they insured upon the faith of this capital, or that they were induced to become corporators in consequence of its existence.

The court, in the case last cited, shows clearly that to make an estoppel, whatever the representation or acts may be, it must be shown that the party injured not only had a right to rely on the representations or acts, but that he was actually induced to, and did change his situation by reason of such representations.

Indeed, the principle has become so well settled that citation to particular authorities is unnecessary. They are collected in 2d Smith's Leading Cases, page 688 *et seq.*, 7th Am. Ed.

The rule is applicable to the fourth paragraph of facts above recited, upon which an estoppel is claimed. The record, having set forth all the evidence, fails to show that any person acted upon the facts set up in the evidence and collated in paragraph No. 4.

V.

THERE HAVING BEEN NO AUTHORITY FOR THE OFFICERS OF THE GREAT WESTERN INSURANCE COMPANY TO ISSUE THE STOCK SOLD TO DEFENDANT, THE ACT OF ISSUING THE SAME WAS BEYOND THE POWER OF THE OFFICERS AT THE TIME, AND WAS "ULTRA VIRES." HENCE, IT CANNOT BE RENDERED VALID BY AID OF THE DOCTRINE OF ESTOPPEL.

Hood vs. *New York & N. H. R. R. Co.*, 22 Conn. 502.
Tradewell vs. *Com'rs of Hancock*, 11 Ohio St., 183, 191.
Hopple vs. *Brown*, 13, Ohio St., 311.
Stace and Worth's Case, 4 Ch. App., 682.
Angel & Ames on Cor. Sec. 256.

In Stace and Worth's case, reported in 4th Ch. Appeals 682, an attempt was made to amalgate two companies under the English Corporations Act. Stace and Worth had received certificates of shares in the new company called the London and Northern Insurance Corporation; both had attended meetings of the corporation, and had signed policies and taken part in the proceedings as directors between the 15th day of September, 1867, and the 31st of May, 1868 In June, 1868, a resolution was passed for voluntarily winding up the corporation, and the names of Stace and Worth were placed on the list of contributories. This was an application to have their names removed from the list. The Vice Chancellor, after hearing the case twice argued, removed their names and the official liquidator appealed. It was claimed on the part of the appellant the amalgamated company had done nothing beyond their powers, but if they had, the appellees were directors of the company before and

after the amalgation and *have held themselves out to the world* as shareholders in the amalgated company.

Sir C. J. Selwyn, L J., held that the agreement between the amalgamating companies was *ultra vires.* That it was beyond the powers of at least one of the parties to it, and consequently it was wholly void. Upon the other point he said: Fully paid up shares were, it was said, allotted to them in exchange for their shares in the *Investment Company,* and their names were entered on the register as holders of shares —all which acts were said to have been done in pursuance of this agreement, which was void. It was also said that these gentlemen attended several meetings of the amalgamated company, and acted as directors of the London and Northern Corporation, and in that capacity signed policies. All those acts were, however, done with and in pursuance of, this void transaction. * * * If the court was right in holding the agreement void, it could not be said that these gentlemen were ever in a position in which they could have enforced an agreement to have shares as against the *Corporation.* It was, therefore, clear that they could not now be included in the list of contributories"

Sir G. M. Gifford, L. J., was of the same opinion; in addition he cites the case of the Imperial Bank, of China vs. the Bank of Hindustan (Law Rep. 6, Eq. 91) to the effect that although a large majority of the shareholders had bound themselves to recognize a shareholder, yet it was not enough to bind the dissentients if the bargain was beyond the powers of the corporation.

Here were acts more decided in their character than those of *Mr. Chubb* in the case under consideration, and the court permitted appellees to show and rely upon the fact of illegality in defence. It may be urged that the defendant *Chubb* ought to be bound as against parties dealing with the company represented by the assignee, because he should have investigated as to the authority of these officers of the com-

pany to issue stock, and that if he had investigated he would have ascertained two facts. 1st, That the company never had obtained any authority to increase its stock to $5,000.-000, and, 2d, that they had not increased it beyond $100,000. The answer to this is that both of those points were matters of fact and law, which all persons dealing with the corporation were bound to know, one as much as another. The question was just as much open to the investigation of a policy holder, or a person contracting for insurance as a person contracting for stock. The charter was a public act, and limited the capital to $100,000. Any step to increase it was open to inspection and investigation, and a principle applicable of the doctrine of estoppel should not be lost sight of in this connection, and that is, when both parties know or have means of knowledge, and each is equally negligent or careless in their investigation, neither can have an equitable claim to relief against the other. And this rule is particularly applicable to the parties in this case. *Mr. Chubb* resided at Grand Rapids, Michigan. The corporation was one organized in and belonging to the State of Illinois. The charter and other papers were on file at Springfield—a place distant from his residence. These losses occurred and the persons whom plaintiff represents resided at Chicago, the place of the location of this company. They had a better opportunity of investigation and of knowledge.

Under all the circumstances it does appear to me that neither negligence or laches can be imputed to defendant in not sooner investigating the authority of the company to issue and sell him the stock.

It cannot be said that he was waiting to see whether it would turn out to be a profitable investment or not. He never did receive any benefit from it, and he did not ascertain the facts in relation to the spurious character of this stock, and of the fraud with reference to its pretended increase, until after the bankruptcy of the corporation nor until after the commencement of this suit.

It cannot be the rule that the fact of bankruptcy of the corporation cuts off the right of defendant to interpose his defence, or makes that lawful and binding which without it would be null and void. Mere delay in enforcing one's rights does not operate as estoppel There must be other elements enter into the circumstances of the case to have such effect.

Bidwell vs. *Astor*, 16 New York, R. 263.
Covington vs. *Bowles*, 9 Bush., (Ky.) 493–4.
Matter of *Empire Assurance Co.*, L. R. Ch. App. 271-2.
Schenck vs *Ingraham*, 5 Hun. 397. 400.

We submit that the learned judge before whom this cause was tried, did not apply the proper rules in his charge to the jury, and in his rulings as to admission of evidence on the trial, for it nowhere appears in the testimony that the defendant designedly made admissions or representations inconsistent with the defence which he set up and offered to prove, nor that any other party had either with or without his consent or knowledge so acted upon such admissions or representations, that he would be injured by allowing the defence to be proved.

Hawes vs. *Marchant*, 1 Curtis, CC. 136, 144
Audlenried vs. *Betteley*, 5 Allen, 382.
Turner vs. *Coffin*, 12 Allen, 401.

J. W. CHAMPLIN,
Att'y for Plaintiff in Error

UNITED STATES

Supreme Court.

OCTOBER TERM, 1877.

No. 124.

A. Samont Chubb,

Plaintiff in Error,

vs.

Clark W. Upton,

Assignee of the Great Western Insurance Company, a Bankrupt, Defendant in Error.

Brief and Argument

FOR DEFENDANT IN ERROR.

HUGHES, O'BRIEN & SMILEY,

Counsel for Defendant in Error.

Dygert, Buff & Rice, Legal and Commercial Printers, Grand Rapids, Mich.

1877.

Chubb vs. Upton, Assignee.

STATEMENT OF THE CASE.

The plaintiff—defendant in error—brought this action in the court below as assignee in bankruptcy of the Great Western Insurance Company, a corporation organized under the laws of the State of Illinois.

The Company was originally chartered by the legislature of that State in 1857. (See a copy of the charter on pages 25 and 26, printed record.)

In 1870 acting under and by virtue of the general laws of that State authorizing Insurance Companies to increase their capital stock, the directors and stockholders of the company took measures to increase the capital stock of the Company, and filed their papers for that purpose in the office of the Secretary of State of Illinois, and also in the office of the Auditor of Public Accounts of that State. By these proceedings the Company undertook to increase its stock to five millions of dollars. (See copies of the papers filed on pages 16, 17, 18, 19 and 20 of printed record.)

The Company assumed that they had increased their stock, took subscriptions to the increased stock and issued certificates therefor, and immediately commenced doing business, issuing policies, etc., upon the basis of an increased capital stock, and on December 31st, 1870, held out to the public that their subscribed stock was $1,188,000.00, of which $222,831 was paid in, $965,169 subscribed, for

which the subscribers or holders are liable. (See page 21, printed record.)

The defendant became a subscriber to this increased stock and a certificate for fifty shares was issued to him on the 25th day of November, A. D. 1870. (See printed record, page 24.)

The Company had a branch office at Grand Rapids where meetings were held of the stockholders residing there. The defendant was President of said branch and participated in the meetings of the stockholders. He also took part in a meeting of stockholders and directors held at Chicago in January, 1871. At one time while he held said stock he gave another person a proxy to attend and vote at a stockholder's meeting at Chicago. He paid money upon his stock in February, 1872. (See page 25, printed record.)

The Company continued to do business, issue policies, etc., until it was put into bankruptcy in February, 1872. The plaintiff was duly appointed assignee of the Company on the 11th day of April, 1872, and the Court made an order in the bankrupt case calling upon the stockholders to pay in the balance due upon the stock held by them on or before August 15th, 1872. This notice was served upon all the stockholders.

Upon the trial of the cause the defendant objected to the introduction in evidence of the proceedings by which the Company increased its capital stock, upon the ground of alleged irregularities in those proceedings and informality in the papers filed in the public offices. The objections were overruled and the defendant excepted to the ruling of the Court.

The defendant also objected to the introduction in evidence of papers filed in the public offices of Illinois by the

Company, showing that it was doing business and that it had stock subscribed to a large amount.

This objection was overruled and the defendant excepted.

The defendant undertook to show in his defense by the depositions of Charles H. Rees and others, that the stock sold to the defendant was spurious and that the originals of the paper documents introduced on the part of the plaintiff relative to increasing the stock of the Company, were forged, fradulent and void, and that the persons who pretended to assent to the increase of stock had no authority to do so.

The testimony offered for that purpose was excluded and the defendant excepted to the ruling of the Court.

The defendant further offered to prove that he was induced to purchase the stock by false representations that he would only be compelled to pay twenty per cent upon the amount subscribed.

This testimony was rejected by the Court and the defendant excepted.

The defendant after offering to prove various alleged false representations by which he was induced to subscribe for the stock, all of which was ruled out by the Court, offered to prove that the holders of the stock in the original company never increased their stock or authorized any one to increase it, and never sold or transferred their stock to the new company.

This was also, upon objections being made, ruled out by the Court, and the defendant excepted to the said ruling.

The Court substantially charged the jury that upon the admitted facts, and upon further facts proved by the plain-

tiff by uncontradicted and documentary evidence, the plaintiff was entitled to recover and that the matters offered in evidence by the defendant constituted no defense to the action. The defendant excepted to the instruction.

POINTS FOR DEFENDANT IN ERROR.

1st. A stockholder in a corporation, who has participated in its exercise of corporate rights can not when sued upon an assessment upon his stock question the regularity of the organization of the corporation, and when the corporation has increased its capital stock under the law of the State permitting it, and the defendant has became the holder of such increased stock and participated in the acts of the Company upon that basis, he is estopped from disputing the regularity of the proceedings by which the stock was increased in an action to recover calls on his subscription.

Gross'. Stat. of Illinois, pp. 354, 355, 357.
Eaton vs. Aspinwall, 19 N. Y., 119.
Methodist Church vs. Pickett, ib., 482.
Swarthout vs. Mich. A. L. R. R. Co., 24 Mich., 389.
People vs. Maynard, 15 Mich., 463.
People vs. Oakland Co. Bank, 1 Doug., (Mich.) 282.
Stone vs. Great W. Oil Co., 41 Ills., 85.
Tarbell vs. Page, 24 Ills., 47.
Baker vs. Backus, 32 Ills., 97.
Boggs vs. Olcott, 40 Ills., 303.
Sanger vs. Upton, 91 U. S., 56.
Upton Assignee vs. Hansbrough, 3 Bissell, 417.
The Kansas City Hotel Co. vs. Harris, 51 Mo., 464.
Litchfield Bank vs. Church, 29 Conn., 137.
Harrod vs. Hamer, 32 Wis., 162.
McHose vs. Wheeler, 45 Pa. St., 32.
Buffalo & A. R. R. Co. vs. Cary, 26 N. Y., 75.

Graff vs. Pittsburgh, 31 Pa. St., 497.
Stone vs. Berkshire Congregational Society, 14 Vt., 86.
Citizens Mutual Ins. Co., vs. Sortwell, 8 Allen, 223.
Ohio & M. R. R. Co. vs. McPherson, 35 Mo., 13.
Bissell vs. M. S. R. R. Co., 22 N. Y., 259.
Payson vs. Stoever, 2 Dillon, 428.

2d. It is proper to show in such an action that the corporation in its organization or in increasing its stock, had attempted a compliance with the law, although the proceeding do not fully comply with all that is required by the statute.

Methodist Church vs. Pickett, 19 N. Y., 485.
Upton vs Hansbrough, 3 Bissell 417.

3d. In connection with the attempted compliance with the statute it is also competent to show acts of user, and the two matters when shown constitute a corporation *de facto*.

Same causes cited above.

4th. It is no defense to such an action to show that the defendant was induced to subscribe to the stock by false and fradulent representations, when it appears that the defendant has not been diligent in discovering the falsity of the representations, and has not offered to surrender his stock until the corporation has become indebted to innocent creditors.

Upton vs. Tribilcock, 91 U. S., 45.

5th. The unpaid subscriptions to stock of a corporation constitute a trust fund for the benefit of the corporation and the trustees of the corporation cannot release the stockholders from payment in full.

Ogilvie vs. Knox Ins. Co., 22 How., 387.
Upton vs. Tribilcock, 91 U. S., 47.

ARGUMENT.

MAY IT PLEASE YOUR HONORS:—

In this cause the facts were not in dispute. There was no conflict of evidence. Upon the trial in the court below it was admitted by the defendant that he held stock in the corporation of which the plaintiff was assignee, and that the stock held by him was of the increased stock. He owned the stock from November 25th, 1870, until February, 1872, when the corporation was put into bankruptcy. He participated in the meetings of stockholders and directors during this period, was entered on the books of the company as a stockholder, held a certificate for his stock signed by the President and Secretary of the corporation, and he held and enjoyed all the rights and privileges of a stockholder in the corporation.

Can he, under such circumstances, be heard to say that the corporation was irregularly organized and that it had irregularly increased its stock, when the Company had become bankrupt, and its assignee is looking after and collecting its assets for the purpose of paying its creditors—debts contracted while the Company was operative under its organization which he seeks to dispute, and while he was a holder of its increased stock, which he says was irregularly authorized capital stock of the Company? We submit that he cannot, that he is estopped from setting up such a defense.

The Company as originally formed existed under a charter granted by the Legislature of the State of Illinois, and it will be noted as an important fact that the laws of that state authorized an increase of stock by any then existing Insurance Company.

The statute of that State provided as follows:

"Any existing Fire Insurance Company and any Company formed under this law, may at any time increase the amount of its capital stock after notice given once a week for four weeks, in any newspaper published in the county where such Company is located, of such intentions with the written consent of three-fourths in amount of its stockholders unless otherwise provided in its charter; or if a mutual Company, with the unanimous consent of its trustees, unless otherwise provided in its charter, by altering or amending their charter in this respect, and filing a copy of their charter so amended, together with a declaration under its corporate seal, signed by its President and Directors, of their desire so to do, with such written consent of three-fourths of its stockholders or the unanimous consent of the Trustees as aforesaid to such increase, in the office of the Auditor of Public Accounts, and upon the same proceedings as are required by the 10th section of this act."

See Gross', Stat. Ills., p. 357, Chap. 53, Sec. 18.

The Section 10 of said act, authorizing the organization of Insurance Companies as well as the increase of capital stock of those already existing, referred to in section 18 above quoted, reads as follows:

"The charter and proof of publication herein required to be filed by every such Company shall be examined by the Attorney General, and if found conformable to this act and not inconsistent with the Constitution and laws of this State,

shall be certified by him to the Auditor of Public Account who shall thereupon cause an examination to be made either by himself or by three disinterested persons, especially appointed by him for that purpose, who shall certify, under oath, that the capital herein required of the Company named in the charter, according to the nature of the business proposed to be transacted by such Company has been paid in, and is possessed by it in money, or in such stocks and bonds and mortgages as are required by Section 8 of this act, or if a mutual Company, that it has received and is in actual possession of the capital, premiums or *bona fide* engagements of insurance or other securities, as the case may be, to the full extent and of the value required by Section 6 of this act: and the name and residence of the maker of each premium note forming part of the capital, and the amount of such note, shall be returned to the said Auditor, and the corporators and officers of such Company shall be required to certify under oath that the capital exhibited to those persons is *bona fide* property of the Company Such certificate shall be filed in the office of the said Auditor, who shall thereupon deliver to such Company a certified copy of the Charter and of said certificates, which on being filed in the office of the Clerk of the County where the Company is to be located, shall be their authority to commence business and issue policies, and such certified copy of the charter and of said certificates, may be used as evidence for or against said Company, with the same effect with the originals and shall be conclusive evidence of the fact of the organization of such Company."

Under this law of the State the already existing corporation made an attempt to increase its capital stock. They filed papers under the law for that purpose; they were examined by the Attorney General of the State and certified

by him to be sufficient, and thereupon the Company proceeded to issue its stock upon the basis and theory that it had been increased, and the defendant became a holder and owner of that stock. The defendant was held out by the corporation to the public as a corporator and his stock was included in the amount which the Company stated to the business world, constituted its capital stock and assets. Upon the faith of such representations the Company was enabled to do business and incur liabilities.

The defendant was permitted by the other stockholders of the Company to participate in its management, in case it had been successful he would have shared in its dividends with the other stockholders. Then why should he not share the losses of the Company to the extent of his capital stock in it, now that it has became bankrupt and incurred large liabilities?

It is a well established rule that where under a law authorizing the formation of corporations, persons have attempted a compliance with the statute and have acted under their attempted organization, they are estopped from disputing the organization.

In *Eaton vs. Aspinwall*, 19 N. Y., 119, the defendant was sued to recover the amount due by him to an alleged corporation of which he was a stockholder.

The statute of the State authorized the formation of such corporations, and the corporators had attempted a compliance with its terms, but their organization was irregular. The corporation had acted without objection on the part of the State. The defendant relied upon the irregularity in the organization of the Company for a defense.

Gray J., in delivering the opinion of the court said: "It (the corporation) is nevertheless a corporation *de facto*, and may carry on its business and sue in its corporate name. * * * Thus it will be seen that this corporation though not a valid corporation in point of law, may carry on its enterprises, have its day in court, divide its revenue among the holders of the shares of its capital, until the State shall interfere and ask that it be dissolved. * * * It would be palpably wrong to permit the defendant, who is one of the owners of the capital stock of this corporation which operates and sues for his benefit, to set up the failure of its organizers to perform a duty initiatory to its legal existence, when the plaintiffs if sued by the corporation for the defendant's benefit, could not set up the same fact as a defense to them."

In *Methodist Episcopal Church vs. Pickett*, 19 N. Y., 482, the plaintiff corporation sued Pickett to recover on a subscription towards building the church. Picket alleged in his defense that there was no corporation; that the proceedings under which they claimed an organization were irregular.

Selden J., in delivering the opinion said: "Two things are necessary to be shown in order to establish the existence of a corporation *de facto*, viz:

"1st. The existence of a charter or some law under which a corporation, with the powers assumed, might lawfully be created; and

"2d. A user by the party to the suit of the rights claimed to be conferred by such charter or law. The rule established by law as well as by reason is that parties recognizing the existence of corporations by dealing with them, have no right to object to any irregularity in the organiza-

tion, or any subsequent abuse of their powers not connected with such dealing.

See opinion of Court on pp. 484, 485.

In *Swarthout vs. Mich. Air Line R. R. Co.*, 24 Mich., 389, the corporation sued Swarthout on a subscription to stock. The defendant claimed that the organization of the company was irregular.

Cooley J., in delivering the opinion of the Court said: "The State alone can take advantage of a defect in the constitution of a corporation like the one in this case. In its action it will be governed by public policy and considerations. In the case of the associates in the corporation *de facto*, and those who have had dealings with it, there is a mutual estoppal resting upon broad grounds of right, justice and equity. The first class are not suffered to deny their incorporation, nor the second to dispute the validity of their assertions of corporate powers. The State itself it has been held in this State, may be precluded by its action or neglect from denying the incorporation or from taking advantage of a forfeiture after long acquiescence."

See *People vs. Maynard*, 15 Mich., 463.

People vs. Oakland Co. Bank, 1 Doug. (Mich.) 282.

It is the established rule in Illinois where this corporation was organized.

See *Stone vs. Great Western Oil Company*, 41 Ills., 85, where the Company sued Stone upon a call on a subscription to stock. The defendant plead *nul tiel corporation*. The Company claimed to have organized under the general law, but its organization was defective in that the papers required by law to be filed in the office of the Secretary of State were not filed.

Held, That an organization in fact and user under it was sufficient to show a corporation *de facto*.

See opinion of Bresee J., pp. 93 and 94.

See also the following cases in Illinois :

Tarbell vs. Page, 24 Ills., 47 ; opinion by Judge Walker, p. 47.

Cross vs. Pinckneyville Mill Co., 17 Ills., 54 ; opinion by Scates, C. J. p. 56.

Baker vs. Backus, 32 Ills., p. 97 ; opinion by Judge Breese.

Boggs vs. Olcott, 40 Ills., 303.

The same rule should apply to an increase of stock by a corporation, because it is a part of its organization. Fixing the amount of the capital stock is a necessary part of the organization of every corporation. Persons who are subscribers to its original stock are estopped from disputing the organization of the Company issuing the stock. An increase of the stock is but a change in its organization, extending its capital and increasing its stockholders. The same reasons that require the original stockholder not to dispute the organization should estop the holder of increased stock.

If this were not so, great frauds might be committed upon the public. We should have corporations organized with a few thousand dollars of original stock and millions of increased stock. The holders of increased stock could participate in the advantages of the corporation in its prosperity and refer the creditors of the corporation to the original stockholders in its adversity.

In the case of *Sanger vs. Upton, assignee*, 91 U. S., 56,

this court applied this rule to stockholders in this very corporation.

Swayne J., in delivering the opinion of the court, said: "Where there are defects in the organization of a corporation which might be fatal upon a *writ of quo warranto*, a stockholder who has participated in its acts as a corporation *de facto* is estopped to deny its rightful existence." See p. 64.

In *Upton, assignee vs. Hansbrough*, 3 Bissell, 417, an action by this same plaintiff against a subscriber for and holder of increased stock in this same corporation, Hopkins J., in delivering the opinion of the Court, said: "The first point urged by the defendants and which was common to all was that the plaintiff had failed to show the legal organization or existence of the bankrupt company, and that the plaintiff had also failed to establish the right of the Company to increase its capital stock. The plaintiff gave in evidence the charter of the Company, granted in 1857, and also the proceedings taken by it in 1869 and 1870, to increase its capital stock, which the defendants objected to as not in compliance with the statutes. The plaintiff also showed an issue of an increased amount of capital stock after such proceedings and the transaction of the business of insurance in the ordinary way. If I were to examine those proceedings with the same strictness in this case as in a proceeding on behalf of the State to annul or forfeit the charter, I might find some difficulty in upholding them. But I understand the rule to be well settled, that when papers having color of compliance with the statutes have been filed with the proper State officers and meet their approval, but are in fact so defective as to be incapable of supporting the corporation as against the State, they are as against a subscriber to its capital, held sufficient to constitute a corporation *de facto*, if supported by proof of user. This Company at-

tempted to increase its capital, filed papers for that purpose in the office of the Auditor, received subscriptions for and sold its capital stock under such assumed increase, received part payment thereon, and incurred large liabilities upon policies of insurance issued by it, bearing upon their face evidence of such increase of its capital stock. This was sufficient to constitute the Company a corporation *defacto*, so that neither it nor its stockholders can object that it is not a corporation *de jure*."

In the *Kansas City Hotel Co. vs. Harris*, 51 Missouri, 464, the action was upon calls on the stock of the Company. The stock of the original corporation was $40,000, and it was afterwards increased to $80,000. The defendant had participated in the organization of the Company and held of both the original and increased stock. The action was for calls upon both. The defendant had participated in the acts of user by the Company. Adams J., in delivering the opinion of the Court, said: "I see no valid objections to the instructions given for plaintiff. They assert in substance the legal axiom that the defendant having participated in all the proceedings creating the corporation and in increasing the stock and making the calls both as stockholder and director he is now estopped from raising any question in this action as to their validity."

Litchfield Bank vs. Church, 29 Conn., 137. An action by the receivers of the bank upon notes given for subscriptions and a count upon the original subscriptions for stock. The defense was that the bank had never been legally organized. That it was only a pretended bank. That it was a bogus, fraudulent and unauthorized concern. That the necessary capital stock had never been subscribed and that the subscription of one Houghtaling was fraudulent and illegal.

Held, that these alleged matters constituted no defense; that by participating in the acts of the corporation the stockholders were estopped from setting up such a defense.

See opinion of Ellsworth J., p. 146.

See also *Harrod vs. Hamer*, 32 Wis., 162; opinion by C. J. Dixon, pp. 165, 166, 167.

McHose vs. Wheeler, 45 Pa. St., 32; opinion by C. J. Lowrie, p. 40.

Buffalo & A. Railroad Co. vs. Cary, 26 N. Y., 75.

Graff vs. Pittsburgh R. R. Co., 31 Pa. St., 497.

Stone vs. Congregation Society of Berkshire, 14 Vt., 86.

The corporation may accept an amendment of its charter by acting under the amendment.

See *Citizens Mutual Ins. Co. vs. Shotwell*, 8 Allen, 223.

The persons acting as stockholders, directors and officers of this corporation, exercising its rights and privileges, are to be considered as rightfully doing so until they are legally ousted.

See *Ohio & Miss. R. R. Co., vs. McPherson*, 35 Mo., 13. And the corporation could by its acquiescence wave any right to eject them.

See *Bissell vs. Michigan Southern & Northern Ind. R. R. Co.*, 22 N. Y., 259.

In *Payson vs. Stoever*, 2 Dillon, 428, it was held that the Republic Insurance Company, organized under the laws of Illinois, might increase its capital stock without a direct vote of the stockholders to increase it, although the statute declared that necessary. It was held that the acquiescence in the increase of stock by the stockholders and user by them which recognized the increased stock was sufficient.

The holders of increased stock in this corporation were accorded all the rights of original stockholders. They held office and voted and participated in the meetings of stockholders. Their names appeared on the books of the company as stockholders, indeed the increased stockholders were in the majority, and the original stockholders made no objection to their management of the affairs of the corporation.

The State made no objection. By acquiescence on the part of the State and the original corporators, the increased stockholders managed the corporation until it became indebted. Why should they not now be held to pay their subscriptions when creditors call for the trust fund, pledged to pay such indebtedness?

II.

The evidence offered by the plaintiff to show that the corporation attempted to increase its capital stock was admissible for that purpose. In all cases where the existence or organization of a corporation is in issue, it has been held proper to show that the Company undertook to comply with the statutes.

See *Methodist Church vs. Pickett*, 19 N. Y., 485.
Upton vs. Hansbrough, 3 Bissell, 417.

III.

The evidence offered by the plaintiff, including the reports of the Company to the officers of the State of Illinois, the pamphlets issued to the public showing the amount of capital stock and the policies issued by the Company, were competent for the purpose of showing user by the Company, and also for the purpose of showing that the officers of the Company were permitted by the original as well as increased stockholders to hold out to the world that

the defendant was a stockholder and officer in the Company, and that the corporation represented a large amount of stock, capital and assets.

See *Upton vs. Hansbrough*, 3 Bissell, *supra*.

IV.

The offer to prove that the defendant had been induced to subscribe to the capital stock of the Company through false and fraudulent representations, was properly rejected.

This branch of the alleged defense has been disposed of by the case of Upton, assignee, vs. Tribilcock, 91 U. S., 45.

It was there decided that the defendant who held his stock until after the bankruptcy of the Company, without making any inquiry as to the truth or falsity of the representations upon which he purchased his stock, came too late with his offer to surrender his stock.

Hunt J., said "As to the fraud the defendant testified that he had no knowledge or suspicion of its existence until after the demand made upon him in 1873 by the assignee, and that he never made any investigation as to the truth of the representations as to the eighty per cent liability until after said demand in 1873. On this point there was no contradictory evidence. It should have been ruled as a question of law."

In this cause in connection with the defendant's offer to prove the alleged false representations, he stated that "the defendant had no notice, or information, or knowledge of any facts to put him upon inquiry touching the truth or falsity of said representations, until after the bankruptcy of said Company, nor until after the commencement of this suit."

It would seem then clearly to have been his duty to make enquiry to ascertain the facts before the expiration of so long a time and before the Company became involved in bankruptcy. If he had been as diligent in exposing the character of the organization while he was acting as President of the Grand Rapids branch, for the benefit of persons who were taking policies in it, as he was subsequent to its bankruptcy, and suit being brought against him, for the purpose of making a defense to the suit quite likely he would have discovered its true condition. But not making any effort to discover its condition as a stockholder he can hardly claim the benefit of a discovery as against persons who have become creditors of the Company while he was satisfied to be a member of it without making enquiry.

The false representations complained of and which the defendant offered to prove, all belong to the same class. The others could have been investigated and their truth or falsity ascertained even more easily than these. For instance, could not the defendant have ascertained whether his friends and acquaintances in Chicago were stockholders in the corporation when he attended the meetings of stockholders there. Could he not have ascertained by looking at the stock register, as to the amount of stock subscribed, could he not have satisfied himself about that long before February, 1872, and could he not have ascertained whether the franchises of the old Company had been transferred to the new?

The defendant's offer to prove that the stockholders had not assented to the increase of stock was a still weaker attempt at defense. The records purported to show that the stockholders had consented. The stock had actually been increased and without objection from the State or any stock-

holder. The Company had transacted business upon that basis and the defendant had been a leading figure in the management of the Company while it was so doing. This should be a sufficient answer to that proposition.

We do not find the oft referred to depositions in the record and perhaps from that reason alone the court could not say there was any error in excluding them. They were offered for a certain purpose and for that the court excluded them. The presumption would be in favor of the ruling of the court and against error.

But if any inspection and examination of the depositions could be had it would be seen that they did not prove or tend to prove any such state of facts, as the defendant offered them for the purpose of proving.

V.

After excluding the testimony offered by the defendant the court charged the jury in substance that the plaintiff was entitled to recover. He could do nothing less under the admitted facts in the case.

The organization of the company, the increase of its stock had been shown by documentary and uncontradicted testimony. User by the corporation under the amended organization had also been proved. The defendant was recognized by the corporation as a stockholder and was upon the stock ledger as such. He held an office in the company and had a certificate of stock. He had voted at meetings of stockholders and given others proxies to vote. His stock was of the increased stock and he had paid money upon it as late as 1872. These facts certainly make one a stockholder. The company had passed into bankruptcy and the plaintiff was its assignee and represented its credit-

ors. Is it not difficult to see why he should not recover. The unpaid subscription to stock in such cases is a trust fund for the benefit of its creditors.

In *Ogilvie vs. Knox Ins. Co.*, 22 How., 387, Grier J., said: "Stockholders who have not paid the whole amount of stock subscribed by them stand in the relation of debtors to the corporation to that amount. The stock subscribed constitutes the capital or fund publicly pledged to all who deal with them."

In *Upton, assignee, vs. Tribilcock*, 91 U. S., 47, Hunt J., said: "The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund of which the directors are the trustees. It is a trust to be managed for the benefit of its shareholders during its life and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one and cannot be disregarded. Its violation will not be undertaken by any just minded man and will not be permitted by the courts. The idea that the capital of a corporation is a foot ball to be thrown into the market for the purposes of speculation, that its value may be elevated or depressed to advance the interests of its managers, is a modern and wicked invention. Equally unsound is the opinion that the obligations of a subscriber to pay his subscription may be released or surrendered to him by the trustees of the company. This has been often attempted but never successfully. The capital paid in and to be paid in is a fund which the trustees can not squander or give away. They are bound to call in what is unpaid and carefully to husband it when received."

It was held by this court in the two cases last above cited that stock held by a person which was represented as non assessable was nevertheless wholly collectable.

We are not aware that we have passed by without notice any of the questions raised by the plaintiff in error and we submit that nearly if not quite all the questions presented by the record have been heretofore determined against the plaintiff in error by this court in the cases herein cited. For that reason we have not felt called upon to go more extensively into an examination of the other American and English authorities.

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Counsel for Defendant in Error.

58 Ill 444

8 Cir Bl

Jones v Vi
supreme Court Book
dishonored
Statements sent out
Cullen on Statements
remarks

Wall 295
2 Dill 428
22 N.Y. 258
12 Wall 355
4 Chapmans